SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 612

THE CALIFORNIA OREGON POWER COMPANY, PETITIONER,

vs.

BEAVER PORTLAND CEMENT COMPANY AND CITY OF GOLD HILL, OREGON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Mr. A. E. REAMES, Liberty Building, Medford, Oregon,
For Appellant.

Mr. JOHN K. KOLLOCK, Corbett Building, Portland, Oregon, and
Mr. GUS NEWBURY, Medford, Oregon,
For Appellees.

In the District Court of the United States for the District of Oregon.

No. E.-9126.

THE CALIFORNIA OREGON POWER COMPANY, a Corporation Duly Organized and Existing Under and by Virtue of the Laws of the State of California,

Plaintiff,

vs.

BEAVER PORTLAND CEMENT COMPANY, a Corporation Duly Organized and Existing Under and by Virtue of the Laws of the State of Oregon, and

CITY OF GOLD HILL, OREGON, a Municipal Corporation, Existing Under the Laws of the State of Oregon,

Defendants.

CITATION ON APPEAL.

United States of America: To Beaver Portland Cement Company, a Corporation Duly Organized and Existing Under and by Virtue of the State of Oregon, and City of Gold Hill, Oregon, a Municipal Corporation, Existing Under the Laws of the State of Oregon, Defendants in the Above-entitled Cause:

YOU ARE HEREBY NOTIFIED that in a certain case in equity in the *United States Court* in and for the District of Oregon, wherein The California Oregon Power Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, is complainant, and the Beaver Portland Cement Company, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and City of Gold Hill, Oregon, a municipal corporation, existing under the laws of the State of Oregon are defendants, an appeal has been allowed the complainant therein to the United States Circuit Court of [1*] Appeals for the Ninth Circuit.

YOU ARE HEREBY CITED AND ADMONISHED to be and appear in said court at San Francisco, California, within thirty (30) days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should

*Page-number appearing at the foot of page of original certified Transcript of Record.

not be corrected and speedy justice done to the parties in that behalf.

WITNESS the Honorable JAMES ALGER FEE, Judge of the United States District Court for the District of Oregon, this the 23d day of March, 1932.

JAMES ALGER FEE,
United States District Judge. [2]

Due and legal service of the within is hereby acknowledged this twenty-third day of March, 1932.

JOHN K. KOLLOCK,
Attorney for Defendants.

[Endorsed]: Filed Mar. 23, 1932. [3]

In the District Court of the United States for the District of Oregon.

July Term, 1930.

BE IT REMEMBERED, That on the 26th day of July, 1930, there was duly filed in the District Court of the United States for the District of Oregon a bill of complaint in words and figures as follows, to wit:

In the District Court of the United States, for the District of Oregon, Sitting at Portland, Oregon.

THE CALIFORNIA OREGON POWER COMPANY, a Corporation Duly Organized and Existing Under and by Virtue of the Laws of the State of California,

Plaintiff,

vs.

BEAVER-PORTLAND CEMENT COMPANY, a Corporation Duly Organized and Existing Under and by Virtue of the Laws of the State of Oregon and CITY OF GOLD HILL, OREGON, a Municipal Corporation Existing Under the Laws of the State of Oregon,

Defendants. [4]

BILL OF COMPLAINT.

To the Honorable R. S. BEAN and to the Honorable JOHN H. McNARY, Judges of the District Court of the United States, for the District of Oregon:

The California Oregon Power Company, a citizen of the State of California, residing in the City and County of San Francisco therein, brings this bill of complaint against Beaver-Portland Cement Company, an Oregon corporation, residing at Portland, Oregon, and City of Gold Hill, a municipal corporation of the State of Oregon, residing in Jackson County, Oregon, and complains and alleges:

I.

That during all of the times herein mentioned since the year 1920 the plaintiff, The California Oregon Power Company, has been and now is a public service corporation, possessing the powers of eminent domain, and organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City and County of San Francisco therein and resident in said state. That after its organization it complied with the laws of the State of Oregon for the transaction of business therein and ever since has been and now is so qualified to act. That during all of said times it has been and is empowered to manufacture and supply hydro-electric power to the public generally and to municipalities in Oregon, and elsewhere. That more than five years preceding the institution of this suit in this court the plaintiff filed with the Public Service Commission of Oregon its tariffs as a public utility showing its intention to supply electrical power to the public generally as a public utility; that thereafter a hearing was had before said commission and an order made fixing and establishing [5] rates and tariffs to be charged and collected by the plaintiff for such current which was so supplied to municipalities such as the defendant city and to private corporations such as said defendant company; that thereafter the plaintiff furnished continuously to all consumers within the territory served by it electric power and current in accordance with said tariff. That ever

since the filing of said tariff, plaintiff has rapidly increased its facilities for the manufacture of such power and has kept pace and is keeping pace with the demand for such power in such territory served by the plaintiff, and intends to and will comply with its duties and obligations as a public service corporation to so extend its service and increase its facilities for the supplying of such service according to such demand for such current and to that end it did on the 11th day of March, 1921, purchase and acquire the property described in Paragraph IV hereof, being lots one and two of Section 15, Township 36 South, Range 3 West of Willamette Meridian.

II.

That during all of the times herein mentioned the defendant, Beaver-Portland Cement Company, has been and now is a private corporation duly organized and existing under and by virtue of the laws of the State of Oregon and having its principal place of business in and being a resident in Portland, Multnomah County, Oregon. That during none of said times has said corporation ever had, nor does it now possess or exercise any of the powers of eminent domain, nor is the same in any sense a public service corporation. But it is, and during all of such times has been a private corporation engaged in Jackson County, Oregon, in the manufacture of cement, and in connection with such manufacture it uses, and has for more than two years last past used electric current

generated and manufactured by this [6] plaintiff as such public service corporation.

III.

That during all of the times herein mentioned, the defendant City of Gold Hill has been and now is one of the municipal corporations of Oregon organized under the laws of such State and situate and resident in Jackson County, Oregon.

IV.

That ever since the 11th day of March, 1921, the plaintiff has been and now is the owner in fee simple and in the possession of Lots One and Two in Section 15, Township 36 South, of Range 3 West of Willamette Meridian in Jackson County, Oregon, which said lands are situated along the bank of a non-navigable stream known as Rogue River. That plaintiff's ownership of such land extends under the waters of said river and includes the bed thereof lying in front of said Lots 1 and 2 to the middle of the channel or thread of the current of said stream. That said lands are riparian to such stream and during all of the times herein mentioned the plaintiff has been and is the owner of said riparian lands in front of and belonging to said lots extending from the shore line of said non-navigable stream to the middle of the current thereof.

V.

That heretofore on the 20th day of December, 1929, a suit was pending herein, Number E.-8991,

in which this plaintiff was plaintiff and the defendants herein were defendants, in which a decree was on that date duly made, rendered and entered, which among other things decreed as follows:

> "That the plaintiff, The California Oregon Power Company, a public service corporation organized and existing under and by virtue of the laws of the State of California and qualified to transact business in Oregon, is the [7] owner and entitled to the possession of lots one (1) and two (2) in Section 15, Township 36 South, range three (3) West of the Willamette Meridian, Jackson County, Oregon, and which lands lie and are situated along the bank of Rogue River, which is a non-navigable stream. That plaintiff's ownership of said lands extends under the waters of said river, and includes the bed thereof lying in front of said lots, and to the middle of the channel or thread of the current of said stream."

That said decree has never been appealed from and is still in full force and effect.

VI.

That the defendant city was by said decree decreed to be the owner of an easement upon said Lot 1 on a site of an old crib referred to therein, and said decree as to such easement provides as follows:

> "That said old crib or pier herein referred to and for which defendant City has said easement is situate on the said lot 1; the most southwest-

erly corner of said old crib or pier bore north 88° 30′ east and distant 168 feet from a point on the west bank of Rogue River marked by a surveyor's stake and distant 400 feet south from the north quarter corner of Section 15, Township 36 south, range 3 West of the Willamette Meridian, and also bore north 54° 16′ east from a point on the west bank of said river 516.14 feet south from said north quarter corner; the most northwesterly point of said old crib or pier bore north 4° 30′ 47″ each from such southwesterly corner of said crib a distance of 80 feet; the width of said old crib or pier was 10 feet; and its height was 4 feet above low water." [8]

VII.

That by the terms of said decree the defendants herein and each of them were and they are enjoined as follows:

"That the defendants and each thereof, their agents, servants and employees, and all others in the aid or behalf of either thereof, be, and they and each of them hereby are, forever enjoined from building or maintaining any structure or diversion or obstruction works upo any part of said plaintiff's lots one and two, as the same extend under the waters of said river, and to the middle of the channel or the current of said stream, except that it may exercise said easement on the site of such old crib or pier, and to the extent of the size and dimensions thereof as herein determined."

VIII.

That said decree further provides as follows:

"This decree is without prejudice to such rights, if any, as either party to this suit may have under the principle of riparian rights or by appropriation. The water rights, if any, of the parties to this suit, whether claimed under the riparian doctrine, or under the doctrine of appropriation, are not determined."

IX.

That said defendant City of Gold Hill holds the legal title to Lots 6 and 8 and a portion of Lot 7 in said Section 15, all of which it has sold to the defendant Cement Company, but to which title has not been passed, and which title is held as security for the purchase price of said property under a contract of sale executed about the 19th day of October, 1926, from the said city to the said Cement Company and which contract the plaintiff alleges is still in full force and effect although the same may have been, without the knowledge of the plaintiff, [9] modified or changed.

X.

That plaintiff's said Lots 1 and 2 are situated upon the east side of said river and said lots are contiguous, [illegible]e north line of said Lot 2 being the South Line of said Lot 1. That said Lots 8, 7 and 6 are situated upon the west side of said stream; said Lot 8 being opposite said Lot 1; said Lot 7 being opposite said Lot 2; and said Lot 6 adjoins Lot 7 on the south. That said Lots 8, 7 and 6 border on said stream.

XI.

That while the said suit No. E.–8991 was pending, the defendant Cement Company drilled numerous holes in the bedrock bottom of said river on said Lot 8 for the purpose of and with the intention of inserting dynamite in said holes and exploding the same and thereby lowering the bed of said river so as to draw the waters of said stream away from the shores and lands of said Lots 1 and 2. That immediately when the plaintiff obtained knowledge of said action it notified the defendants herein not to so blast the channel of said stream and the defendants desisted such operations, however, filling said holes with wooden plugs to keep the same from filling with sand and other materials. On the evening of the 21st day of July, 1930, the defendant Cement Company, without the knowledge or consent of the plaintiff, exploded large quantities of dynamite that had been inserted in said holes in the bed of said river and perhaps in other similar holes so drilled in said stream bed without the knowledge of the plaintiff. That by such explosion of said dynamite the defendant cement company shattered and broke the rock in the bed of said stream for a distance of more than one hundred feet up and down said stream and for a width of more than fifty feet and to a depth of approximately eight feet. That said acts were clandestinely [10] done and without the knowledge or consent of the plaintiff and against its will. That the purpose and intention of the defendant cement company was and is to remove the stone so

broken in the bottom of said river and to thereby create a race in the bed of said stream, which will be at least fifty by one hundred feet and at least eight feet in depth. That the defendant cement company is now continuing such drilling operations with the intention of continuing the construction of such deep race in the bottom of said stream and unless restrained herein the said defendant cement company will remove said stone from such portions of said river bed that have been so blasted and will explode additional blasts and remove the stone so broken thereby and will draw into said race all of the running water of said stream and leave the plaintiff's said lots one and two without any water thereon. That said operations are continuing rapidly and it is necessary that a restraining order be immediately made restraining the said defendant cement company and the said city from so permanently changing the thread and current of said stream from the plaintiff's said land. That the defendants intend to and will, unless so restrained at once permanently change the thread and channel of said stream from where it now is and from where the same was when the rights of the respective parties were so adjudicated and determined in said suit No. E.-8991. That such action by said defendant if continued will take from plaintiff's said Lots 1 and 2 all of the running waters of said stream during the low water period and would at the present time divert from said lands all of said waters. Said action would leave plaintiff's lands high and dry; they would no longer border upon said stream as they now and naturally

do, nor would the waters of said stream flow over said land or any part thereof during the period of low water in said stream. [11]

XII.

That the plaintiff needs and requires said Lots 1 and 2 with said waters for the purpose of the manufacture of electric power to so furnish to consumers as a public utility. That it acquired said lands with their said riparian rights for such purpose and intends to immediately use said lands for such purposes. That ever since the year 1926 the parties hereto have been in litigation concerning the use of plaintiff's said lands and the waters of said stream so that the plaintiff has not had during any of said time an opportunity to construct upon said lands the facilities necessary to so use its said lots and said water for such public purposes.

XIII.

That all of these said acts of the defendants, and particularly of said defendant the cement company are wrongful and unlawful and if permitted to continue will entirely destroy plaintiff's said lots 1 and 2 for such purposes and will cause the plaintiff to suffer great and irreparable injury and damage.

XIV.

That the value of the subject matter or the amount in dispute herein exceeds, exclusive of interest and costs, the sum of five thousands dollars. That the value of plaintiff's property so being destroyed by the defendants is in excess of the sum

of thirty thousand dollars. That the entire value of such property for power purposes if it shall be so deprived of said water will be entirely lost to the plaintiff.

XV.

That the defendant City of Gold Hill is aiding and abetting the said defendant cement company in its said wrongful operations in so permanently changing the channel of said [12] stream as to take such stream entirely away from plaintiff's said Lots one and two and it is necessary that a restraining order be immediately and without notice made restraining the defendants and each of them from removing any of the stone or other material from the bottom of said river or from changing the channel or thread of said stream or from carrying on any drilling operations in the bed of said stream for the purpose or with the intention of permanently changing the course of said stream and restraining them and each of them from blasting the rocks or stones in the bed or channel of said stream and from doing any act or thing that would in any way either change the channel of said stream or the course thereof or draw or divert from said Lots 1 and/or 2 any of the waters naturally flowing in said stream or from doing anything that will interfere with the natural flow of said stream over plaintiff's said Lots 1 and 2.

XVI.

That the defendant cement company has by its said drilling and the exploding of such dynamite and the shattering of the bed of said stream dam-

aged the plaintiff in the sum of five thousand dollars and if such acts shall be continued the plaintiff will suffer great and irreparable injury and damage.

XVII.

That the defendants give out and assert that they intend and will so lower the bed of the stream along the west line of the thread thereof so as to draw from the plaintiff's said Lots 1 and 2 the entire stream at low water, to the great and irreparable injury and damage of the plaintiff.

XVIII.

That the plaintiff has no plain, speedy or [13] adequate remedy at law and therefore comes into equity.

WHEREFORE the plaintiff prays that immediately upon the filing of this complaint, without notice, a restraining order issue restraining the defendants and each of them, their agents, servants and employees and all others in the aid or behalf of either or any thereof and restraining their successors and the agents, servants and employees thereof from doing anything that will lower or change the bed of said stream or that will lessen the flow of the water of said stream at and over plaintiff's said Lots 1 and/or 2, and from carrying on any drilling or blasting operations in the bed of said stream, or from removing from the bed of said stream any of the rocks or other material that have been shattered or broken or loosened by any drilling or blasting operations of the defendants or either

thereof, or doing any acts that will be of any injury to plaintiff's said Lots 1 and 2.

That upon a hearing herein such restraining order become an injunction and that upon a final hearing herein such injunction be made perpetual.

That plaintiff be decreed to be the owner in fee simple of said Lots 1 and 2; that said lots be decreed to be riparian to said stream and that plaintiff's said ownership of said lots extends under the waters of said stream to the center of the current or thread of said stream and that the defendants be enjoined from chaning said thread or current.

That the plaintiff have judgment against the defendant cement company for the sum of five thousand dollars damages and the costs and disbursements of this suit to be taxed, and for such other and further relief as to the court shall seem just and equitable in the premises.

A. E. REAMES,
Attorney for Plaintiff.

(Verification omitted.)

Filed July 26, 1930. [14]

AND AFTERWARDS, to wit, on Saturday, the 26th day of July, 1930, the same being the 16th judicial day of the regular July term of said court,—Present, the Honorable JOHN H. McNARY, United States District Judge, presiding,—the following proceedings were had in said cause, to wit:

[Title of Court and Cause.]

RESTRAINING ORDER.

Upon considering of the duly verified complaint of the plaintiff herein from which it appears that unless a restraining order be at once issued without notice immediate and irreparable loss and damage will result to the plaintiff and the plaintiff having tendered with its application for such order a good and sufficient surety bond in the sum of five thousand dollars and which bond and the amount thereof are hereby approved, and the court having heard A. E. Reames, of counsel for the plaintiff, and being fully advised in the premises,—

IT IS ORDERED, ADJUDGED AND DECREED that until the further order herein, the defendants, Beaver-Portland Cement Company, a private corporation of Oregon, and the City of Gold Hill, a municipal corporation of Oregon, their agents, servants and employees and all others in the aid or behalf of either thereof, and the successors of either and their agents, servants and employees, be and they and each of them hereby are restrained from and ordered not to do anything which will draw from either Lots 1 or 2, Section 15, Township 36 South, Range 3 West of Willamette Meridian any of the waters of said Rogue River now flowing over, upon or across said lots or either thereof or which naturally flow along or over the same, or which would in anywise lower the channel of said stream opposite said lots, either on Lot 8 in said

section [15] or elsewhere that would in any way change the center or thread of said Rogue River at or in front of or along said Lots 1 and/or 2, nor to remove any of the stone or other materials from the channel of said stream that would tend to draw from said Lots 1 and/or 2, any of the waters of said stream naturally flowing there or to drill any holes for powder or other explosives in said stream where the same would so tend to so change the course of said stream nor to explode any dynamite or other explosives that would break or shatter the bed of said stream at such places as would lower or change the bed of said stream whereby any of the waters naturally flowing in said stream would be withdrawn or diverted from either said Lots 1 and/or 2, or both thereof.

This order is made returnable to this court at the hour of 10 A. M. on the 30th day of July, 1930, at which time the plaintiff's application for an injunction in accordance with this order shall be heard.

The defendants and each of them and all others in their aid or behalf are hereby ordered to at said time show why such an injunction should not issue subject to the further order herein.

Dated at Portland, Oregon, this 26th day of July, 1930, at 10 A. M.

JOHN H. McNARY,
District Judge.

Filed July 26, 1930. [16]

AND AFTERWARDS, to wit, on the 18th day of September, 1930, there was duly filed in said court a stipulation between the parties, in words and figures as follows, to wit:

[Title of Court and Cause.]

STIPULATION EXTENDING TIME TO ANSWER AND RELATIVE TO HEARING ON ORDER TO SHOW CAUSE.

It is hereby stipulated by and between the parties hereto through their respective attorneys who have executed this stipulation, that

WHEREAS on the 26th day of July, 1930, a restraining order was issued in the above-entitled court and cause, restraining the defendants from the commission of certain acts as therein recited, and which order with the subpoena herein has been duly served, and

WHEREAS said restraining order fixed the hour of ten o'clock A. M. on Wednesday, the 30th day of July, 1930, for a hearing upon plaintiff's application to make such restraining order an injunction herein,—

NOW, THEREFORE, it is hereby stipulated by and between the parties hereto that the hearing upon said application for the injunction be postponed until some time in the month of September, 1930, to be designated by either or any of the parties hereto for such hearing; that such notice shall be for a hearing at a time convenient to the

above-entitled court and that such notice shall not be given before the first day of September, 1930, and such notice shall not be for a less time than 10 days; that the time within which the defendants are required to answer herein may be extended until the time of the giving of said notice; that an order may be made in the above-entitled court and cause in accordance with this stipulation upon the application of any of the parties hereto without notice to the others; that pending the hearing upon the plaintiff's application for said injunction, the said restraining order [17] shall be and remain in full force and effect and so remain in effect until otherwise ordered by the court after such hearing.

A. E. REAMES,
Attorney for Plaintiff.
GUS NEWBURY,
Attorney for Defendants.

Filed September 18, 1930. [18]

AND AFTERWARDS, to wit, on the 18th day of September, 1930, there was duly filed in said court an answer, in words and figures as follows, to wit:

[Title of Court and Cause.]

ANSWER.

To the Honorable R. S. BEAN and to the Honorable JOHN H. McNARY, Judges of the District Court of the United States, for the District of Oregon:

Come now Beaver Portland Cement Company, a

corporation duly organized and existing under and by virtue of the Laws of the State of Oregon, and the City of Gold Hill, Oregon, a municipal corporation, and for answer to the bill of complaint herein:

I.

As to the allegations of Paragraph I, admit that during all the times mentioned in the complaint California Oregon Power Company has been, and now is, a public service corporation, possessing the powers of eminent domain, and organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City and County of San Francisco therein and resident in said state; that after its organization it complied with the laws of the State of Oregon for the transaction of business therein, and ever since has been and is now so qualified to act; and that during all of said times has been, and is now, empowered to manufacture and supply hydro-electric power to the public generally and to municipalities in Oregon and elsewhere.

II.

As to the further allegations of Paragraph I, deny [19] any knowledge or information sufficient to form a belief as to whether more than five years preceding the institution of this suit, or at any time, the plaintiff filed with the Public Service Commission of Oregon, its tariffs as a public utility, and whether thereafter a hearing was had besaid Commission and an order made fixing and establishing rates and tariffs to be charged and

collected by the plaintiff to municipalities and private corporations; or whether thereafter the plaintiff furnished continuously to all consumers within the territory served by it, electric power and current according to said tariffs, or whether since the filing of said tariffs, or at any time, plaintiff has increased its facilities for the manufacture of such power and has kept pace, or is keeping pace, with the demands for such power in the territory served by plaintiff, or that the plaintiff intends to, or will, comply with its duties and obligations as a public service corporation to extend its service or increase its facilities for the supplying of such service according to the demands for such current, and therefore deny all of said allegations.

III.

As to the further allegations contained in said Paragraph I, defendants admit that on the 11th day of March, 1921, the plaintiff purchased and acquired the property described in Paragraph IV of the complaint, being Lots 1 and 2, Section 15, Township 36 South, Range 3 West of the Willamette Meridian, and deny any knowledge or information as to the end with which it purchased and acquired said property.

IV.

Admit all and several the allegations of Paragraph II.

V.

Admit all and several the allegations of Paragraph III. [20]

VI.

Admit all and several the allegations of Paragraph IV, save and except the defendants allege that plaintiff's ownership of Lots 1 and 2, in Section 15, Township 36 South of Range 3 West of the Willamette Meridian, extends under the water of said river and includes the bed thereof lying in front of said Lots 1 and 2 to the thread of the stream; and that in non-navigable rivers of the State of Oregon, the thread of the stream as marking and defining the dividing line of ownership of properties abutting and fronting upon opposite sides of said stream, is the middle line of the river at low water therein, and is a line equidistant from all points on opposite banks at right angles with the thread of the stream at lowest stage of water therein.

VI.

Admit all and several the allegations of Paragraph V.

VII.

Admit all and several the allegations of Paragraph VI.

VIII.

Admit all and several the allegations of Paragraph VII.

IX.

Admit all and several the allegations of Paragraph VIII.

X.

Admit that the defendant City of Gold Hill holds the legal title to Lots 6 and 8 and a portion of lot

7, in Section 15, Township 36 South, Range 3 West of the Willamette Meridian; deny all of the other allegations of Paragraph IX, and allege that said property is in the possession of defendant Beaver Portland Cement Company under a contract of lease and option to [21] purchase; a copy of which lease and option to purchase is set forth as an exhibit to the further and separate answer and defense of these defendants; and further allege that the ownership of defendant City of Gold Hill in and to the said lands extends under the water of said river and of the bed thereof lying in front of said lots to the thread of the stream.

XI.

Admit all and several the allegations of Paragraph X.

XII.

As to the allegations of Paragraph XI, admit that on the evening of the 21st day of July, 1930, the defendant Beaver Portland Cement Company, without the consent of the plaintiff, exploded quantities of dynamite in holes drilled in rock formation lying entirely west of the thread of the stream between the property of plaintiff and of defendant City of Gold Hill as specifically described in the complaint; which rocks, in place, were an obstruction to the flow of the waters of Rogue River, and that by such explosion the defendant Beaver Portland Cement Company shattered and broke such rock formations for a maximum distance up and down said stream of approximately 100 feet, and

for a maximum width of approximately 27 feet, and for a depth in the rock where said holes were drilled of approximately eight feet, but at no point below the bed of the stream, and that the purpose and intention of the defendant Beaver Portland Cement Company was to remove the rock so broken and lying in the bed of said Rogue River westerly from the thread of said stream, and that the defendant Beaver Portland Cement Company, if and when the restraining order herein issued shall have been dissolved, will remove said rock; and deny generally each and every other allegation of said Paragraph XI. [22]

XIII.

Deny all and several the allegations of Paragraph XII.

XIV.

Deny all and several the allegations of Paragraph XIII.

XV.

Deny all and several the allegations of Paragraph XIV.

XVI.

Deny all and several the allegations of Paragraph XV.

XVII.

Deny all and several the allegations of Paragraph XVI.

XVIII.

Deny all and several the allegations of Paragraph XVII.

XIX.

Deny all and several the allegations of Paragraph XVIII.

And for a further and separate answer to plaintiff's complaint, these defendants allege:

I.

That during all the times herein mentioned the California Oregon Power Company has been, and now is, a corporation, incorporated and organized and existing under and by virtue of the laws of the State of California.

II.

That during all the times herein mentioned defendant City of Gold Hill has been, and now is, a municipal corporation [23] of the State of Oregon, incorporated, organized and existing under and by virtue of the laws of the State of Oregon, and being situate in the County of Jackson, State of Oregon.

III.

That during all of the times herein mentioned defendant Beaver Portland Cement Company has been, and now is, a private corporation, incorporated, organized and existing under and by virtue of the laws of the State of Oregon, having its principal office in the City of Portland, Multnomah, Oregon, and an office and place of business in the vicinity of Gold Hill, Jackson County, Oregon.

IV.

That the plaintiff is the owner and in possession

of Lots 1 and 2, Section 15, in Township 36 South, Range 3 West of the Willamette Meridian, in Jackson County, Oregon, abutting on and adjoining Rogue River; that patent for said property from the United States was issued to Francis Marion Friedenberg April 20th, 1885; that said lands were acquired in 1902 by Condor Water & Power Company, a corporation, incorporated, organized and existing under and by virtue of the laws of the State of Oregon, and thereafter, through mesne conveyances, passed to the plaintiff on or about the 11th day of March, 1921; that neither the plaintiff nor any of its predecessors in the title to said property has at any time constructed any works for the application to a beneficial use of any portion of the waters of Rogue River flowing by or along its said property, or made any beneficial use of said water, or any portion thereof, either prior to the enactment of Chapter 216 of the General Laws of Oregon for 1909, being the act commonly known and designated as the Oregon Water Code, or at any time subsequent thereto; that neither the plaintiff nor [24] its predecessors in interest have at any time made or attempted to make any appropriation of the waters of Rogue River under the laws of the State of Oregon applicable thereto, nor has the plaintiff, nor any of its predecessors in title, ever had any right to the waters of said river at or appurtenant to the real property of the plaintiff described in the complaint.

V.

That in that certain suit in equity originally

pending in the Circuit Court of the State of Oregon for Jackson County, between Condor Water & Power Company, a corporation, and Gold Hill Canal Company, a corporation, predecessors in interest and in the ownership of the real property hereinabove described, and involving the right of the defendant Gold Hill Canal Company to construct a dam over and across Rogue River, which suit in equity was subsequently removed to the United States District Court for the District of Oregon, the plaintiff therein, in and by its complaint filed on the 10th day of September, 1906, alleged that Lots 1 and 2, Section 15, Township 36 South, Range 3 West of the Willamette Meridian, in Jackson County, Oregon, being the real property described in the complaint herein as the property of the plaintiff, has been acquired by the plaintiff therein, to wit, The Condor Water & Power Company, predecessor of plaintiff herein, for the purpose of carrying on its objects, purposes and business in the appropriation of water and the manufacture of power for public purposes and for the sale and distribution of water and electrical power to the public, and that plaintiff needed said Lots 1 and 2 and the riparian rights belonging thereto for the purposes for which said corporation was organized, and that the demand for electric current and water for irrigation was increasing and that plaintiff would be required to meet said demand.

That on or about the 5th day of October, 1926, [25] defendant City of Gold Hill, as plaintiff, in-

stituted in the Circuit Court of the State of Oregon for Jackson County, a complaint against the plaintiff herein, for the condemnation by said City of Gold Hill of all those portions of said Lot 1 upon which said City of Gold Hill proposed to construct a dam across Rogue River, and that in its answer filed in said condemnation proceedings, the plaintiff herein, as defendant in said action, alleged, among other things, that it was a public service corporation; that it had acquired said Lot 1 for the purpose of using it in connection with the manufacture of electrical energy to furnish power to consumers and to the public generally and as a public utility; that it had determined that it should construct and that it did intend to construct upon said property a hydro-electric plant for the manufacture of electric power; that it was holding said property to make said power development as soon as the market should require such power.

That in that certain suit in equity pending in the District Court of the United States for the District of Oregon on the 13th day of September, 1928, in which the plaintiff herein was plaintiff, and defendants herein were defendants, the plaintiff herein in and by its complaint alleged that the plaintiff herein and therein acquired Lots 1 and 2, Section 15, Township 36 South, Range 3 West, for the purpose of establishing diversion works to divert the waters of Rogue River for the purpose of manufacturing such power, and that it then needed and required the same for said purpose, and that it would so utilize said property for such public

purposes as soon as there should be a market within its territory to be served with such power, which event would occur in a very short time.

That notwithstanding said allegations, neither the plaintiff nor its predecessors in interest, or its predecessors in interest in the ownership of said property, have at any time since 1906 taken any steps to appropriate the waters of Rogue River [26] at the point in question, or to apply the same to a beneficial use, or to construct any works for such appropriation and application.

That the litigation pending between the parties hereto since 1926, including the condemnation proceeding in the Circuit Court of the State of Oregon for Jackson County, the suit in equity, E.–8991, in the District Court of the United States for the District of Oregon, and the pending suit, has not in anywise involved the right of the plaintiff herein, if it had any such right, to appropriate or attempt to appropriate to a beneficial use, the waters of Rogue River at the point in controversy in the pending litigation, but have solely involved the rights of the defendants to construct such works as would enable them to apply to a beneficial use the waters of Rogue River owned and held by defendant City of Gold Hill by adjudication and appropriation.

VI.

That the opposition by the plaintiff herein to the effort made by defendant City of Gold Hill to condemn, under the right of eminent domain, an easement for the construction of a dam across Rogue

River from the property of defendant City of Gold Hill on the west bank of said river to the property of the plaintiff on the east bank, and the institution by plaintiff of the suit in equity, No. E.–8991, in the District Court of the United States for the District of Oregon, to enjoin, and which did enjoin, the construction of a wing-dam from the west bank of Rogue River upon the property of the said defendant City of Gold Hill, to the site of the old crib near the east bank of said river and beyond and east of the thread of Rogue River at the point in controversy and the institution of the pending litigation, are not prompted or actuated in good faith, by any desire or intention on the part of the plaintiff herein to [27] utilize its real property, to wit, Lots 1 and 2, in the construction of any works for the application of the waters of Rogue River to a beneficial use, but solely and exclusively to prevent the defendants from applying the waters of Rogue River to which they are entitled by adjudication and appropriation to a beneficial use and from the construction of hydro-electric works by which electric power would be supplied to defendant Beaver Portland Cement Company in connection with its operation of a cement plant in the immediate vicinity of Gold Hill, and thereby deprive plaintiff of a profitable customer for the electric power manufactured by it and distributed through Rogue River territory.

VII.

That the plaintiff owns, holds and has in operation, electric power plants from which, as a public

utility corporation, it can supply electric power to its customers within the territory covered by it, with a developed horse-power of approximately 125,000 horse-power, which is amply sufficient to meet all the present demands of the market; and has applied to the State Engineer of the State of Oregon for final permits covering 245,420 horse-power, involving completion of the proposed plants within a period of from five to twenty years, and that the development of such plants will more than meet any possible requirements for power of said company within said period of twenty years.

VIII.

That the development of power on Rogue River at the site of plaintiff's and defendants' real property hereinabove described would involve a maximum development of not to exceed 5,700 horse-power, provided that the water of Rogue River at the point in question could be appropriated by the plaintiff, and provided that the rights of defendant City of Gold Hill [28] in and to the west bank of said river opposite the real property of the plaintiff and to the waters of Rogue River now appropriated and owned by it, could be appropriated by the plaintiff under the law of eminent domain.

IX.

That by Chapter 287 of the General Laws of Oregon of 1929, it was enacted that all of the waters flowing in the main channel of Rogue River below the south line of Section 27, Township 33 South,

Range 1 East, were forever withdrawn from appropriation except for domestic, stock, irrigation and municipal purposes. That the defendant City of Gold Hill is a municipal corporation under the laws of the State of Oregon and its right to real property and the waters of Rogue River are not subject to condemnation at a suit of a public service corporation.

X.

That the defendant City of Gold Hill is the owner and in possession of Lots 5, 6, 7 and 8, of Section 15, Township 36 South, Range 3 West of the Willamette Meridian, in Jackson County, Oregon, abutting on and adjoining Rogue River and directly across said river from the real property of the plaintiff hereinabove and in the complaint herein described, and the bed of Rogue River opposite said lots to and west of the thread of the stream.

XI.

That the defendant City of Gold Hill is the owner and in possession of the right to divert, for the development of power and for other purposes, 1397 cubic feet per second of the waters of Rogue River, to wit:

(a) 75 cubic feet per second adjudicated to [29] Neilson & McClure in the proceedings in the Circuit Court of the State of Oregon for Jackson County, adjudicating the relative rights to the waters of Rogue River and its tributaries; which decree was entered of record in said court on the 26th day of April, 1919, and conveyed by mesne conveyances to defendant City of Gold Hill; with

a point of diversion in Lot 3 of Section 11, Township 36 South, Range 3 West of the Willamette Meridian, and for use and application in Section 15, Township 36 South, Range 3 West of the Willamette Meridian.

(b) 220 cubic feet per second adjudicated to Oregon Water & Power Company by said adjudication and conveyed to the defendant City of Gold Hill by mesne conveyance with a point of diversion at a point in the northeast quarter of the northwest quarter of Section 15, Township 36 South, Range 3 West of the Willamette Meridian, and for application to a beneficial us within said section.

(c) 147 cubic feet per second awarded to defendant City of Gold Hill by Permit of the State Engineer of the State of Oregon, No. 3275, February 28th, 1917, based on Application No. 5410; of which appropriation, 25 cubic feet per second have been conveyed under contract to Gold Hill Irrigation District, leaving the net appropriation under said application and permit, 122 cubic-feet per second; with a point of diversion in the northwest quarter of Section 11, Township 36 South, Range 3 West of the Willamette Meridian, for application within Section 15, said township and range.

(d) 980 cubic feet per second awarded to defendant City of Gold Hill by permit No. 7942 issued by the State Engineer of the State of Oregon May 26th, 1927, as an [30] enlargement of Permit No. 3275 theretofore issued by said State Engineer on Application No. 9738; with a point of diversion in the northwest quarter of Section 15,

Township 36 South, Range 3 West of the Willamette Meridian and for application within said section.

XII.

That for more than thirty years the defendant City of Gold Hill and its predecessors in the ownership of the right to use the waters of Rogue River under the rights adjudicated and granted as described in the last preceding paragraph have been using such waters in the development of power, in supplying water for domestic uses to the citizens of Gold Hill, and in the generation and distribution of electrical energy for light and power purposes.

XIII.

That on or about the 19th day of October, 1926, there was made and entered into by and between defendant City of Gold Hill and defendant Beaver Portland Cement Company, an agreement of lease and option to purchase; a copy of which is hereto attached as Exhibit "A" and by this reference made a part hereof.

XIV.

That defendant Beaver Portland Cement Company entered upon possession of said property under and by virtue of said option and contract and is proceeding in good faith in the development thereof in pursuance of said contract, and not otherwise, and that the development of said property is necessary for defendant City of Gold Hill and its citizens.

XV.

That the defendant Beaver Portland Cement

Company [31] is now, and has been since the year 1914, engaged in the operation of a cement plant in the immediate vicinity of the City of Gold Hill, just outside of the City Limits thereof, and employs a large force of men, and that substantially all of the labor employed at said plant is furnished by residents and citizens of the City of Gold Hill.

XVI.

That subsequent to the entry on the 20th day of December, 1929, of final decree pursuant to mandate of the United States Circuit Court of Appeals for the Ninth Circuit, in Case No. E.-8991, and prior to the 21st day of July, 1930; defendant Beaver Portland Cement Company has been, and was, proceeding to construct from the west bank of Rogue River on the property of defendant City of Gold Hill held by said defendant Beaver Portland Cement Company under lease and option agreement as hereinabove set forth, a wing-dam extending to but entirely west of the thread of the stream of Rogue River between the real property of plaintiff and of defendant City of Gold Hill as defined in the complaint and in this further and separate answer, and was proposing to construct as soon as physical conditions should warrant and as soon as broken rock should be available for such construction, a structure on the site of the old crib referred to and described in said decree, and entirely within the dimensions of the old crib as so established.

XVII.

That west of the thread of the stream as so de-

fined, and below and downstream from the structure upon the site of the old crib, and below and downstream from the head and eastern terminus of the wing-dam as the same is proposed to be constructed by the defendant Beaver Portland Cement Company under its contract with defendant City of Gold Hill, Rogue River was, and is obstructed by reefs of rock which have materialy obstructed [32] the flow of said Rogue River and prevented the development and utilization by the defendants of the water rights vested in them by adjudication and appropriation as said rights are hereinabove specifically set forth.

XVIII.

That on the 21st day of July, 1930, for the purpose of procuring the greatest possible development of power from the waters of Rogue River to which the defendant City of Gold Hill is entitled by adjudication and appropriation as hereinabove set forth, and to as nearly as possible completely utilize all of the water to which defendant City of Gold Hill is and was so entitled, and especially to permit the free flow of, and thereby to utilize, the waters of Rogue River which would be diverted by the construction of the wing-dam to, but entirely west of the thread of the stream, in process of construction by defendant Beaver Portland Cement Company as hereinabove described, and further to procure an available supply of broken rock for the erection of the structure on the site of the old crib hereinabove referred to, as defined by the final decree in case No. E.-8991, the defendant Beaver

Portland Cement Company exploded certain charges of dynamite in said rock reefs in said Rogue River, and that by such explosion, such rock reefs were broken and shattered, and the rocks so broken and shattered lays in the channel of Rogue River west of the thread of said stream, and defendant Beaver Portland Cement Company was engaged in removing, and would, if it had not been restrained by the restraining order herein, have removed said shattered rock from the bed of the stream.

WHEREFORE, defendants having fully answered the bill herein, pray that the above-entitled cause be dismissed and that the defendants have and recover of and from the plaintiff their costs and disbursements herein. [33]

JOHN K. KOLLOCK,
Attorney for Defendants.

(Verification omitted.) [34]

EXHIBIT "A."

THIS AGREEMENT, made this 19th day of October, A. D. 1926, between the City of Gold Hill, Oregon, a municipal corporation, party of the first part, and the Beaver Portland Cement Company, a corporation, party of the second part,

WITNESSETH: Whereas, pursuant to a vote of the electors of said City of Gold Hill at a special election held July 6, 1926, it was determined to accept that certain proposition of the party of the second part for the lease and option of purchase of the hydro-electric power site, plant and equipment

of party of the first part and all its interest in and to the real property therein referred to, and specified, upon the terms conditioned in said offer,—a copy of said offer being hereto attached and made a part of this agreement, for the purpose of construing the same;

NOW, THEREFORE, the party of the first part, in consideration of the rent to be paid, and the performance of the covenant and conditions herein agreed to by party of the second part, does hereby let, lease, and demise unto said party of the second part, all the following described real and personal property, and rights and interests therein, to wit:

1. Lots one (1) and Two (2), Three (3), Four (4) and Nine (9), Water Park Addition, to the City of Gold Hill, Jackson County, Oregon. (Being the property of the party of the first part lying on the west bank of Rogue River between the Pacific Highway Bridge and the City Boundary and between the River and Sams Valley Highway.)

2. Power site plant and equipment of party of the first part located in lot nine (9) in Water Park Addition to the City of Gold Hill, Jackson County, Oregon, together with the power distribution system now owned by party of the first part.

3. All water rights owned by the City. Said water [35] rights to include among others the following:

(a) Adjudicated water right of Oregon Water & Power Company to two hundred and twenty (220) cubic-feet per second of the waters of Rogue

River for the development of seven hundred and fifty (750) theoretical horse-power by diversion at a point in the northeast quarter of the northwest quarter (NE¼ NW¼) of section fifteen (15), township thirty-six (36) South, Range three (3) west, Willamette Meridian, with a priority of 1899.

(b) Water right obtained by permit from the State Engineer of the State of Oregon, No. 3275, on application No. 5410, February 20, 1917, for one hundred forty-seven (147) cubic feet per second of the waters of Rogue River for the development of five hundred (500) theoretical horse-power at a point of diversion in the northwest quarter (NW¼) of section eleven, township thirty-six (36) south, range three (3) West, Willamette Meridian.

(c) Water right obtained or to be obtained under application No. 9738 filed August 6, 1924, for the appropriation of one hundred and ninety (190) cubic-feet per second of the waters of Rogue River, at a point south seven degrees (7°) west twelve hundred fifty (1250) feet from the quarter section corner at a point in the northwest quarter (NW¼) of section fifteen (15), described as south seven degrees (7°) west twelve hundred fifty (1250) feet from the quarter section corner between sections ten (10) and fifteen (15), township thirty-six (36) south, range three (3) west, Willamette Meridian, with enlargement application under same number filed January 14, 1926, for seven hundred and ninety (790) cubic-feet per second additional, making an aggregate appropriation applied for of nine hundred and eighty (980) cubic-feet per second.

(d) Water right, or the interest of party of the first part in the water right, adjudicated to Nielson and [36] McClure for seventy-five (75) cubic feet per second with a priority as of 1879, the point of diversion being indicated as in lot three (3), section eleven (11), township thirty-six (36) south, range three (3), West, Willamette Meridian.

TO HAVE AND TO HOLD the said property and rights therein and thereto for the term of five (5) years from the date hereof, for the sum of one hundred dollars ($100.00) per month, which said rental the party of the second part agrees to pay as aforesaid, time being in all things the essence of this agreement;

PROVIDED, HOWEVER, that should legal complications develop whereby the party of the second part is unable to develop or operate the power properties for the purpose for which this lease is made, or should there be a failure of any of the above described water rights whereby party of the second part shall fail to obtain the use of at least 1347 second-feet of water, then the party of the second part may, at its option declare this lease void, and it shall thereupon be absolved from the payment of any further rentals, but in that event all improvements made upon or in connection with said power plant, and all additions or betterments to or of the same, shall, together with the land hereby leased, revert unto the party of the first part free and clear of all encumbrance created by party of the second part, and free from mechanics' and other statutory liens.

Inasmuch as the party of the first part only leases hereby such interest as it has in said land, and other property, the party of the second part may prosecute and defend in the name of party of the first part any action, suit or proceeding necessary to protect, retain, or acquire title to any portion of said property, or rights, or to protect the same against the claims of any other person whomsoever, and upon any termination of this lease the party of the first part shall in [37] nowise be liable unto the party of the second part for the repayment of any rental the second party may have paid nor for any damage, loss, or liability by reason of any defect in the title to any of the said property, and all expense incidental to the prosecution or defense of any legal proceeding connected with any of the matters herein contained shall be borne by the party of the second part without recourse against the party of the first part.

Pursuant to the vote of the electors of said City of Gold Hill, the party of the first part herein, and for valuable consideration to the party of the first part in hand paid by the party of the second part, receipt whereof is hereby acknowledged, the party of the first part covenants with the party of the second part that it will at any time during the five (5) year period aforesaid, sell, assign, transfer, and convey unto the party of the second part all its right, title and interest in and to all of the premises and property hereinbefore described and referred to for the sum of twenty-two thousand six hundred dollars ($22,600.00), this agreement is intended as being an exclusive option unto the

party of the second part, but if the party of the second part, shall, within the period aforesaid, give notice unto the party of the first part of its intention to exercise said option of purchase and to pay the purchase price aforesaid, then if the party of the first part shall so elect, the party of the second part shall, in lieu of the payments of case aforesaid, pay an amount of money sufficient to complete the payment of the principal amount of the bonds outstanding heretofore issued by party of the first part for the purchase price of the property aforesaid, and pay all interest that may thereafter mature on said bonds, but in either event all moneys paid as rental under the provisions of the foregoing lease shall apply as payments on the purchase price of said premises and property, providing said option is exercised, and the balance of the [38] purchase price paid in either of the methods aforesaid.

As further consideration for said lease and option and so long as said lease shall be in full force, and at all times thereafter, should the party of the second part acquire title to said premises and property and all of the city's interest and right in said property under said option, the second party shall and will supply, pump and deliver into the mains of the party of the first part, at the pumping plant, free of charge, all the water which may be required for domestic and municipal uses within said city, and provided further that the second party will proceed without unreasonable delay, at its own expense and without cost to the city, to put the said power plant into operation, and party of the second part agrees

that during the time the present plant is in operation it will furnish free to the party of the first part for municipal lighting such amount of power as is now *d*onsumed by the city, and upon the installation of a larger power plant than that now upon the premises, the party of the second part will furnish electric power to the city to an amount of twenty kilowatts, for municipal use only and free of charge; and should any additional power and light be required for municipal lighting and power by party of the first part, the same will be supplied by the party of the second part at once cent per kilowatt hour, and the same shall not be subject to any increase of rate by any superior, state, or other authority.

It is agreed and provided, however, that should party of the first part elect to have the purchase price of said premises paid in cash, then and in that event the money so received by the first party shall be kept in a special fund and used only for the purchase price of said power plant, which, at this time aggregate approximately twenty-two thousand dollars ($22,000.00) principal. It being understood, that party of the first part will convey, transfer and assign good and clear title, and free from all encumbrances, to all property [39] covered hereby should the option be exercised.

All the provisions herein contained shall apply to and include the successors in interest and assigns of each of the parties hereto, and should the party of the second part make default in the performance of any covenant, condition, or other provision con-

tained herein, on its part to be performed, then such default shall be ground for forfeiture of all rights of the party of the second part hereunder, and upon notice of default and the failure of the party of the second part to remove such default within sixty days from the date of notice mailed and addressed to it at Gold Hill, Oregon, then the party of the first part may declare a forfeiture of all the rights of the party of the second part hereunder, and all such rights, together with said property, and all betterments, improvements and additions thereto shall revert to and become the property of the party of the first part free from any claim of right of interest or demand of the party of the second part, its successors in interest or assigns,—it being expressly understood and agreed between the parties hereto, that should default continue for ten (10) days after notice is given as above provided, the party of the first part may, without further notice and within any legal proceeding, takes possession of said power plant and operate the same.

IN WITNESS WHEREOF, the parties hereto have caused their respective corporate names to be signed and their corporate seals to be affixed hereto in duplicate, this the day and year first above written.

THE CITY OF GOLD HILL. (Seal)
By R. E. COOK, Mayor.
Attest: JOHN HAMMERSLY, Auditor.

In the presence of
P. H. MEYERS.
HARRY CHILDERS.
BEAVER PORTLAND CEMENT COMPANY.
By W. H. MUIRHEAD, Vice-President.
Attest: BUELL C. NELSON. (Seal)
R. E. COOK.
FRED HICKMAN.
(Verification omitted.)

Answer. Filed September 18, 1930. [40]

AND AFTERWARDS, to wit, on Friday, the 19th day of September, 1930, the same being the 60th judicial day of the regular July term of said court,—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding,—the following proceedings were had in said cause to wit:

[Title of Court and Cause.]

ORDER ON MOTION TO DISSOLVE INJUNCTION.

Now at this time comes, on for hearing the motion of the defendants for an order dissolving the restraining order and injunction heretofore issued and for the assessment of damages for the wrongful issuance of the order, the defendants appearing by John K. Kollock, for the motion, and the plaintiff appearing by A. E. Reames, resisting said motion,

and the court having heard the argument of counsel and it appearing that the motion should be determined after the hearing of the evidence in the cause,—

IT IS ORDERED that this matter be and the same is hereby continued until the trial of said cause at the Medford Term of this Court, in October, 1930. The cause is set for trial to follow the Criminal Docket at that term.

R. S. BEAN,
Judge.

Filed September 19, 1930. [41]

AND AFTERWARDS, to wit, on the 23d day of April, 1931, there was duly filed in said court, a replication, in words and figures as follows, to wit:

[Title of Court and Cause.]

REPLICATION.

Comes now the plaintiff and without waiving any of its rights under the bill of complaint herein, and without waiving the right to require the defendants to prove the affirmative allegations of their answer, and in reply to such allegations admits, denies and alleges, as follows:

I.

Replying to that portion of Paragraph V of the further and separate answer of the defendants wherein they allege that on October 5, 1926, the

defendant, City of Gold Hill, as plaintiff, instituted in the Circuit Court of the State of Oregon for Jackson County, an action to condemn certain portions of plaintiff's Lot No. 1, upon which said city proposed to construct a dam across Rogue River and wherein the defendants allege here that this plaintiff, in its answer in said condemnation proceedings, alleged that it was a public service corporation; that it had acquired said Lot No. One (1) for use in connection with the manufacture of electrical energy; to furnish power to consumers and to the public as a public utility, and that it had determined to construct upon said property a hydro-electric plant for the manufacture of such electric power and was holding the property until the market should require such power. This plaintiff admits said allegation and alleges that said condemnation action went to final judgment on the 13th day of June, 1928, at which time a judgment was duly made and entered in said court and [42] cause in favor of this plaintiff, the defendant in said action, and said judgment is a final adjudication upon all of the issues involved in said action. That the same has never been appealed from, modified, or reversed, and is still in full force and effect. So that no construction work was possible during the pendency of that litigation.

II.

Replying to that portion of said Paragraph V in which the defendants here allege that this plaintiff on the 13th day of September, 1928, instituted in

this court an injunction suit against the defendants herein in which it alleged that this plaintiff here had so acquired said Lots one (1) and two (2), Section fifteen (15), Township 36, South of Range 3 West for the purpose of manufacturing such power needed by it for such public purposes and would utilize such property for such purposes when the market in its territory served justified, which in any event would be only a short time, this plaintiff admits said allegations, but alleges that the defendants here appealed from the judgment and decree that had been entered in that suit so that final decree was not entered therein until practically the year 1930, the exact date being the 20th day of December, 1929. In that case the defendants here enjoined from further construction of cement works upon plaintiff's said property; so that no construction work would have been practical during that period in which said litigation was so pending.

III.

That following the entry of that decree, to wit, on the 21st day of July, 1930, the defendants exploded the dynamite and committed the acts recited in the bill of complaint herein resulting in the institution of this suit to prevent injury to the plaintiff by the removal of the rocks shattered by such [43] blasting and to prevent further blasting or changing of the course of said stream, and except as herein admitted and alleged, and except as alleged in the

complaint, the plaintiff denies all of the allegations of said further and separate answer.

A. E. REAMES,
Attorney for Plaintiff,
412 Liberty Bldg.,
Medford, Oregon.

(Verification omitted.)

Filed April 23, 1931. [44]

AND AFTERWARDS, to wit, on the 11th day of March, 1932, there was duly filed in said court an opinion in words and figures as follows, to wit:

[Title of Court and Cause.]

OPINION.

JAMES ALGER FEE, District Judge.—Plaintiff, which is engaged in the business of furnishing electric power, and possesses the right of eminent domain, as a public service corporation, and the City of Gold Hill are the owners of lands on the opposite sides of the center of the Rogue River, a non-navigable stream in Oregon. Defendant Cement Company is operating under executory contracts to purchase the lands of the city.

The parties have been in previous litigation in this court, which terminated in a decree entered in accordance with a mandate of the Circuit Court of Appeals, which enjoined defendants from building a dam across the river, onto lands of the plaintiff

which extended to the center of the stream, except that defendants were permitted to exercise an easement upon the site of an old pier. The decree, pursuant to the direction of the Circuit Court of Appeals in the City of Gold Hill vs. California-Oregon Power Company, 35 F. (2d) 317, 319, contained the following reservation:

> "That said decree is without prejudice to such rights, if any, as either party to this suit may have under the principles of riparian rights or by appropriation. The water rights, if any, of the parties to this suit, whether claimed under the riparian doctrine or under the doctrine of appropriation, are not determined." [45]

After this decree was entered and on July 21, 1930, the defendants, acting entirely upon the lands of defendant city, blew up a portion of the bed of the river upon that side of the thread of the stream, and were intending to clean out the excavation so as to permit the waters to flow freely into the canal, through which the city had heretofore diverted part of the water awarded, under the adjudication of the Rogue in the State Courts, to its predecessors in interest. In addition defendants held certain permits from the office of the State Engineer of Oregon to make further appropriations of the waters of the stream.

Plaintiff sought and obtained a temporary injunction against further action upon the site by defendants, and seeks a permanent injunction to prevent them from lowering or changing the bed of the

river, and from lessening the flow of the water of the stream, and from changing the thread or current, and from blasting and clearing out the debris from the previous blasts.

Testimony was taken before the late Judge Bean, and upon his death the testimony was taken anew, although the former record was introduced by stipulation as evidence.

Plaintiff is not entitled to enjoin defendant from blasting so long as there is no nuisance or trespass upon the real property of plaintiff, nor even consequential injury to the land by concussion. On the other hand, this equitable remedy is not available against excavation upon lands of the defendant, where there is no deprivation of the lateral support for plaintiff's soil. Research discloses the doctrine of lateral support has no relation to flowing waters, and it is doubtful that subterranean waters are controlled thereby. See Popplewell vs. Hodkinson, L. R. 4 Exch. 248. [46]

Complaint is made that the boundary of the plaintiff's land will be changed by the diversion of the water into the canal. But the thread of the stream will not change by a sudden or violent aversion of the water. See Wykoff vs. Mayfield, 130 Ore. 687; Philadelphia Co. vs. Stimson, 223 U. S. 605, 624. The logic of the situation is the same whether the diversion be effected by natural or artificial means. The essential principle is that access to the water should be preserved. Besides in states where the appropriation doctrine is recognized, the right to object to a turning away of the waters depends upon

the question of whether beneficial use has been made by the objector.

The only real question in this case therefore is whether plaintiff is entitled to injunction to prevent diversion of the waters of Rogue River by virtue of its ownership of the land to the center thereof, because neither the blasting nor the excavation will, according to the proof, have any effect upon the plaintiff's land except to divert the water, which defendants claim the right to use.

It is patent, then, that plaintiff is not entitled to equitable relief, unless it has a right to have the water upon its land remain at its natural height, undiminished in quantity.

The decree in the previous case described plaintiff's land as extending under the stream to the center thereof, and as riparian thereto; but it is perfectly clear there was no intention of preventing defendants from diverting the water to which they were entitled by virtue of appropriation, nor of attaching the right of undiminished flow to the lands of plaintiff, by describing them as riparian.

At the outset plaintiff is confronted with the axiom that equity will not interfere to protect an abstract right where no irreparable damage has been done.

Under present conditions, since the need for water and the power of water arises at great distances from the original [47] stream*ed*, there is visible, even in jurisdictions not possessing arid lands, a subtle syncretism of the doctrines of common-law riparian rights and of appropriation. It is by no means cer-

tain that, even in jurisdictions which hold fast to the common law, an injunction would be granted with no more showing of damage than appears in this record.

> "These principles, however, are subject to the modification that the diversion, if for a use reasonable in itself, must cause actual perceptible damage to the present or potential enjoyment of the property of the lower riparian proprietor before a cause of action arises in his favor." Stratton vs. Mr. Harmony Boys School, 216 Mass. 831, 103 N. E. 87.

In theory the rigid rules of the common law should bend to the customs and necessities of the communities in which they operate. In the arid states of the west, therefore, the modification may be urged with more cogency.

> "We deem the true rule to be that the lower riparian owner seeking the injunction must show some real, material and substantial damage to justify a court of equity in enjoining an upper claimant from his actual beneficial use of the water; and that, too, regardless of the fact as to whether such upper claimant claims his right to the use of the water as an appropriator or as a riparian owner using more than his just proportion of the water, after taking into consideration the equal correlative rights of the other owners, under the strict construction of the common law doctrine. And we will add that, owing to the great need and scarcity of waters in the western country, and the neces-

sity that all of the available water supply be put to some beneficial use or purpose, the courts are coming rapidly to this view." Kinney, Water Rights, Sec. 1613.

In an early case the Supreme Court of Washington, which is a state adhering closely to the common-law doctrine, held that before a riparian owner could restrain an appropriator from interfering with the free and unobstructed flow of a stream, the former must show a beneficial use of the water of the stream by himself. Northport Brewing Co. vs. Perrot, 22 Wash. 243; 66 Pac. 403.

"The beneficial use of these waters by appellant could not be enjoined if such use disturbs merely a naked legal right of respondent and subjects it to no injury. The general purpose of a prohibitory injunction is to restrain the doing of an act which will cause irreparable injury when there is no adequate remedy [48] at law. Equity, so far as we know, has never taken jurisdiction to restrain the beneficial use of water required for the irrigation of arid lands when there is no necessity for such restraint nor consequent injury to others." Coulee Livestock Co. vs. Pluvius Devel. Co., 75 Wash. 109, 134 Pac. 684.

These decisions have been quoted and affirmed in the more recent case of Brown vs. Chase, 125 Wash. 542, 553, where it is said:

"It is not to the interest of the state that the water of a non-navigable stream should be

idle or going to waste because one of its citizens, having a preference right to its use, unjustifiably neglects to avail himself thereof, while others stand ready and willing, if permitted, to apply it to the irrigation of their own lands."

It must be remembered in this connection that this is not a contest between a riparian owner and a stranger to the stream. The city is as much a riparian proprietor as the plaintiff. There may be others also who claim upon the Rogue River as riparian proprietors. Under the doctrine enunciated by strict common-law courts, all such owners of the banks are tenants in common of the waters, and the rights of all must be adjudicated at the same time in order to arrive at a proper conclusion. See Caviness vs. La Grande, 60 Ore. 410.

As far as plaintiff's claim of prospective use and development is concerned, it is not entitled to weight, for the history shows that plaintiff has held this land itself since 1921, and has attempted no beneficial use of the waters, and that the Condor Water & Power Company was making the same claim and promise as to these lands by its complaint filed in 1906. See Defendants' Exhibit "EE."

Certainly if there is any virtue at all in the theory of state control of municipal law relating to waters, this court should not issue an injunction upon this record, where the highest court of the state has declared that the riparian owner has no right to let the stream run to waste and prevent proper development. [49]

"A riparian proprietor cannot lay claim to the undiminished flow of a stream, without actual use, simply because it adds beauty to the outlook. 4 Kinney Irr., Sec. 1975. A riparian owner's right to the water for irrigation is limited to the amount of water needed and used, so that to determine that fact the amount of land irrigated, the character of the soil, and the amount of water needed per acre, must be shown." In re Willow Creek, 74 Ore. 592.

The fact that there has been no use of the waters of Rogue by plaintiff determines the present controversy.

There are, moreover, other compelling reasons why injunction should not issue. Equity requires the property right for which protection is sought to be clearly established. But plaintiff proved no usufructuary right to the waters of the Rogue whatsoever. Plaintiff acquired the real property in 1921. The legislature of Oregon abolished riparian rights to water in 1909 in so far as such rights had not already vested. This step the state had a right to take.

After a careful analysis of the decisions of the United States Supreme Court, and after quoting, among other decisions, Kansas vs. Colorado, 202 U. S. 46, to the effect that:

"It may determine for itself whether the common law rule in respect to riparian rights, or that doctrine which obtains in the arid regions of the west, of the appropriation of water for the purposes of irrigation, shall con-

trol. Congress cannot enforce either rule upon any state."

Judge Wilbur, the Senior Circuit Judge of the Ninth Circuit, concludes in U. S. vs. Stockholders Corporation, 52 F. (2d) 322, 329:

> "Without again citing specific statutes or decisions, a general view of the decisions and of the federal legislation leads to the conclusion that it has been the consistent policy of the government of the United States to allow the citizens of the various states to work out their own system of law in relation to water rights, without intervention or adverse legislation by the federal government."

The mere fact, therefore, that plaintiff owns land to-day bordering on a stream in Oregon has no tendency whatever to prove he is the owner of any rights in the flow thereof. [50] If plaintiff desired to raise the question of vested riparian rights under the common law, he should have shown that water flowed unappropriated in this stream past this parcel of land, at some time when the municipal law of the state permitted such rights to the flow of the stream to become crystallized as private property. Equity requires a property right sought to be protected to be clear and established. But plaintiff proved no property right in the usufruct of the waters of the Rogue whatsoever. It is not then entitled to injunction.

These rights to the use of the water at this point were in litigation in the case of Condor Water &

Power Co., a predecessor of the plaintiff, vs. Gold Hill Canal Co. The decree, dated May 3, 1917, introduced by plaintiff, Exhibit 15, enjoined defendants from building a dam entirely across the river, but, as explained by the judgment-roll introduced by defendants, did not enjoin defendants from diverting practically the entire stream under claim of the appropriations, some of which apparently antedated plaintiff's patent, as against a claim by the plaintiffs, and appropriative rights existing in itself. See Exhibit.

The late Robert S. Bean says in his opinion upon which the decree is based:

> "The pleadings raise an issue as to the quantity of water to which the defendants are entitled, but no evidence on the point was offered by the complainant, nor was it referred to at the argument. I therefore conclude that the defendant's claim as set up in the answer and sought to be supported by notices of appropriation given in evidence is, for the purposes of this suit, concluded." See record Condor Water & Pr. Co. vs. Gold Hill Canal Co. et al., No. 3098, introduced as Defendants' Exhibit "EE." [51]

This decree was not pleaded as *res adjudicata*, but it is apparently admitted that the suit was between predecessors in interest of the plaintiff and defendant city. (Pages 91, 92 Trans.)

The plaintiff is bound to prove a clear title to the water rights of this stream before it can maintain this case. Oregon had a right to adopt any rule

of waters which it chose. Proprietary rights to the unlimited flow of water past the land could not be acquired in Oregon after the decision of Hough vs. Porter, 51 Ore. 318, decided May 19, 1908, and certainly not after the enactment of the Oregon Water Code in 1909. The record of this case of Condor Water & Power Co. vs. Gold Hill Canal Co., above referred to, indicates that the plaintiff had no riparian rights in 1911 upon these lands.

Even under the strictest doctrine riparian rights to undiminished flow would not attach to lands which were not patented until the waters of the stream had been appropriated. Therefore, as to water appropriated prior to plaintiff's patent it could have no riparian rights. If it had no riparian rights in 1911, the date of the decree, it could acquire none thereafter, even if the water were abandoned by the appropriator, because the rule of waters had changed in 1908–9.

Plaintiff had the burden of clearly proving its riparian rights in the water, for it insisted it had been deprived of property without due process of law. The court cannot protect property, unless it is proven to have existed. Plaintiff did not acquire this land itself until 1921, at which time riparian rights did not exist under the property rule obtaining at that time in the state, and there is not a scintilla of proof that there had ever been any incident to this land, and the decree of 1911 seems to indicate conclusively that there was none.

Another reason of the noninterference of equity in this cause is found in the fact that another ade-

quate and [52] complete remedy exists under the Oregon Water Code. It is highly probable that it was the intention of the Circuit Court of Appeals to suggest this method of definite determination, by the language of the opinion in the previous case, City of Gold Hill vs. California-Oregon Power Co., 35 F. (2d) 317.

If plaintiff has riparian rights to this land, a scientific determination could have been made by the procedure prescribed by the state law. The statute provides for a proceeding *quasi in rem* and directs that notice be sent to

> "Each person, firm or corporation owning or being in possession of lands bordering on and having access to said stream or its tributaries." Oregon Code, 47–603.

In such proceedings the state courts can and do protect riparian rights, if vested, before the public character of water was expressly declared. See In re Willow Creek, 74 Or. 592, 625; Oregon Code, 47–603.

It has further been held that the statutes are constitutional, and afford due process of law; Oregon Lumber Co. vs. East Forks Irr. Dist., 80 Ore. 568; Pacific Livestock Co. vs. Oregon Water Board, 241 U. S. 440. See also Humboldt Land & Cattle Co. vs. Allen, 14 Fed. (2d) 650.

In Pacific Livestock Co. vs. Silvies River Irr. Co., 200 Fed. 487, the Circuit Court of Appeals reversed the Circuit Court of the United States, for the District of Oregon, in a suit between a riparian owner,

who claimed he was beneficially using the waters of said river by reason of their tendency to overflow his land, against persons attempting to appropriate above him, because the lower court had issued an injunction restraining defendants there from diverting the waters of the Silvies River, but further granting them the right to apply for a vacation of the injunction if it should thereafter "be determined in some appropriate proceeding that there is any surplus water subject to appropriation by them." The Circuit [53] Court of Appeals says:

> "From the decree taken in connection with the opinion it is, we think, quite evident that the court below was of opinion that as between the appellant and the appellees certainly the river carried some surplus water during the high stages, which should be left to future ascertainment. That being so, and the laws of the State of Oregon in force at the time of the decree appealed from, recognizing the rights of riparian properties to a limited extent only, and providing for the right of appropriation of water of the non-navigable streams of the state for beneficial uses, we are of the opinion that the decision here in question should be reversed and the cause remanded for further proceedings, in accordance with those laws."

In accordance with that suggestion a determination of water was made on the streams by the state court, in Re Waters of Silvies River, 115 Ore. 27, 129, 133, where it said "The federal court invited this proceeding."

It is further patent the intent of the Circuit Court of Appeals in the previous litigation between these parties was to have the water appropriately adjudicated before injunction was sought, in accordance with its previous decision above cited, for it was said:

> "In view of the pleadings and the course of the trial, we are of the opinion that the decree herein should be without prejudice to an *adjudication of the relative rights of the parties* (italics ours), as riparian owners or otherwise, to the use of the waters of the stream, when and if, in the future, controversy shall arise in respect thereto." City of Gold Hill, Ore., vs. California-Oregon Power Co., 35 Fed. (2d) 317, 319.

This utterance is binding in the instant controversy, and clearly indicates, on the previous appeal the Circuit Court of Appeals directed application for the adequate and [54] complete remedy existing in the forum provided by the state law.

If there is any doubt about the nature and extent of defendant's rights, or whether plaintiff has any further than the decree here awards, it seems the proper procedure is before the State Water Board. See Pacific Livestock Co. vs. Balcomb, 101 Ore. 233.

But the Oregon reports show that the waters of the Rogue have already been adjudicated by the state courts. In re Waters of Rogue River, 124 Ore. 7. The decree itself was introduced in evidence for the limited purpose of proving part of

defendant's rights upon this very land, and to prove that a right by appropriation was adjudicated to California-Oregon Power Company, plaintiff's corporate predecessor. It was shown that plaintiff, notwithstanding it claims vested riparian rights, is taking advantage of the beneficial doctrine of appropriation by using this right awarded to its predecessor. This in itself would seem to preclude a claim of riparian rights of lower lands. Caviness vs. La Grande Irr. Co., 60 Ore. 410.

The decree was not pleaded as *res adjudicata*, however, nor can the court from the record determine whether the plaintiff's predecessor was served while it held plaintiff's present property, nor whether it had that property when the appropriation was made, in which event the riparian rights above referred to, were probably destroyed. Williams vs. Altnow, 51 Ore. 275, 300. On the other hand, plaintiff prays an injunction from this court after a special proceeding which purports to adjudicate all water rights upon the stream, and it does not present any adjudicated right for the court to protect.

> "Such decree shall in every case declare, as to the water right adjudicated to each party, whether riparian or by appropriation, the extent * * * together with such other conditions as may be necessary to define the rights and its priority." Oregon Code, 47–623. [55]

In the present state of the record this litigation is premature and almost useless. Plaintiff must be relegated therefore to another forum to have its

rights defined before this court will protect them by injunction.

The evidence shows, however, that under certain circumstances the automatic operation of the mill which defendants intend to build might entirely dry up the river, and since the plaintiff has based its right upon the maintenance of the thread of the stream, and defendants concede some water must be allowed to flow in the present bed, the court will enjoin the reduction of the water in the bed below a minimum flow, which will be based on the calculations now in evidence, so that this litigation will not be entirely fruitless, and so plaintiff will not be totally deprived of access to the water and will enjoy to the fullest extent whatever residual rights may be guaranteed by the modified riparian doctrine.

But plaintiff must be denied an injunction of broader scope on account of the fact that no adequate proof was furnished for the exercise of such an extraordinary remedy, first, because no beneficial use of the water is shown by plaintiff, and second, because, although it claims the state doctrine deprives it of property without due process of law, plaintiff did not prove any property whatsoever in the waters of the stream, as an incident to the ownership of the land or otherwise, and third, because an adequate remedy is provided by the laws of the State of Oregon whereby the relative rights to waters may be scientifically determined, but the plaintiff has either not had its rights determined in

such a proceeding, or has failed to plead or prove the results.

The court awards costs to the defendants.

Filed March 11, 1932. [56]

AND AFTERWARDS, to wit, on the 11th day of March, 1932, there was duly filed in said court findings of fact and conclusions of law in words and figures as follows, to wit:

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above-entitled matter having come on for trial before the Honorable James Alger Fee, Judge of the District Court of the United States, for the District of Oregon, upon the pleadings and evidence introduced on behalf of parties, and the court having considered the same, and the arguments of respective counsel, makes and enters the following

FINDINGS OF FACT.

I.

That during all the times since the year 1921 hereinafter mentioned plaintiff, has been, and now is, a public service corporation possessing the power of eminent domain, and organized and existing under and by virtue of the laws of the State of California, and authorized and empowered to do business in the State of Oregon under and by vir-

tue of the laws thereof; that the plaintiff has complied with all the laws of the State of Oregon governing a public utility corporation, and has regularly and duly filed its tariffs with the Public Service Commission of the State of Oregon.

II.

That on the 20th day of April, 1885, patent from the United States was duly issued to Francis Marion Friedenburg for lots 1 and 2, Section 15, Township 36 S., Range 3 W., of the Willamette Meridian, in Jackson County, Oregon, and that title to said property was vested in the plaintiff through mesne conveyance [57] from the said Francis Marion Friedenburg March 11, 1921, and that the plaintiff has been in continuous possession thereof since said last-mentioned date; that said lands abut on and adjoin Rogue River, a non-navigable stream in Jackson County, Oregon, and that plaintiff's ownership extends under the waters of said river, and includes the bed thereof to the thread of the stream.

III.

That the defendant, City of Gold Hill, is a municipal corporation incorporated, organized and existing under and by virtue of the laws of the State of Oregon, and is the owner, and in possession, of lots 5, 6, 7 and 8, Section 15, Township 36 S., Range 3 W., of the Willamette Meridian, in Jackson County, Oregon, abutting and adjoining Rogue River, and directly across said river from the real property of the plaintiff, hereinabove described, and the ownership and title of said defend-

ant includes the bed of said river to and west of the thread of the stream, and that defendant is the successor in the ownership thereof of Gold Hill Canal Company, and Oregon Water and Power Company.

IV.

That in and by the decree in the proceedings in the Circuit Court of the State of Oregon for Jackson County entitled "In the Matter of the Determination of the Relative Rights to the Waters of Rogue River and Its Tributaries," entered of record in said court on the 26th day of April, 1919, there was adjudicated to Neilson and McClure, Proof 27, Volume 1, Priority 1879, seventy-five (75) second-feet for power (250 horse-power) Braden ditch; water to be returned to the stream at or immediately below the place of use; Description of place of use: Lot 3, Section 11, Township 36 S., Range 3 W., Willamette Meridian, Jackson County, Oregon; that the rights of said Neilson and McClure passed by mesne conveyance to, and are now vested in, [58] defendant City of Gold Hill, of which right of appropriation twenty-five (25) cubic-feet per second have been conveyed by the City of Gold Hill to Gold Hill Irrigation District, said twenty-five (25) second-feet being diverted at or near the original point of diversion, leaving net appropriation under said adjudication of fifty (50) cubic-feet per second; that in and by said decree there was adjudicated to Oregon Water and Power Company two hundred and twenty (220) cubic-feet per second of the waters of Rogue River, with the point of

diversion at a point in the NE¼ of the NW¼ of Section 15, Township 36 S., Range 3 W., of the Willamette Meridian, and for application to a beneficial use within said section; that the rights so adjudicated have passed by mesne conveyance to, and are now vested in, defendant City of Gold Hill; that certain of the waters covered by such adjudication have been continuously, for a period of years, applied to a beneficial use in accordance with the terms of said adjudication.

V.

That permits have been heretofore issued to defendant City of Gold Hill by the State Engineer of the State of Oregon under the provisions of the law of 1909 known and described as "The Water Code" for additional waters of the Rogue River to the extent of eleven hundred and twenty-seven (1127) cubic-feet per second.

VI.

That defendant Beaver-Portland Cement Company is a private corporation incorporated, organized and existing under and by virtue of the laws of the State of Oregon, and holds all of the above-described real property, adjudicated water rights and permits in the State Engineer's office of the State of Oregon under an executory contract of sale from defendant City of Gold Hill, and that the defendant City of Gold Hill, [59] and defendant Beaver-Portland Cement Company, are, and have been since the issuance of said permits, proceeding in the construction of works for the ap-

propriation of the eleven hundred and twenty-seven (1127) cubic-feet per second, described in the last preceding finding claiming to be proceeding under the terms and conditions of said permit, and under the terms and conditions of its contract with defendant City of Gold Hill.

VII.

That no testimony has been introduced tending to show that at any time since the date of patent to plaintiff's predecessor, Francis Marion Friedenburg, have the owners of lots 1 and 2, Section 15, Township 36 S., Range 3 W., of the Willamette Meridian, applied the waters of Rogue River to a beneficial use on the said real property, or made any attempt to appropriate said waters under the law of appropriation in force, either by posting and recording notice of appropriation under the law in force prior to 1909, or by applying for an adjudication of water rights at the site in controversy, or by filing an application with the State Engineer for a permit to use and apply said waters; that in and by the decree in the matter of adjudication of the waters of Rogue River in the Circuit Court of the State of Oregon for Jackson County there was adjudicated to California-Oregon Power Company, plaintiff's predecessor in interest, the right to appropriate the waters of Rogue River in the development of power at a point known as Gold Ray, some three miles above the property of the plaintiff described in the complaint and in these Findings, and being lots 1 and 2, Section 15,

Township 36 S., Range 3 W., of the Willamette Meridian.

VIII.

That on the 10th day of September, 1906, there was instituted in the Circuit Court of the State of Oregon for [60] Jackson County by Condor Water & Power Company, a corporation, predecessor in interest and in the ownership of the real property hereinabove described as owned by the plaintiff, a suit in equity against Gold Hill Canal Company, a corporation, the predecessor in interest and title of defendant City of Gold Hill, a suit in equity involving the right of Gold Hill Canal Company to construct a dam entirely over and across Rogue River. This suit in equity was subsequently removed to the United States District Court for the District of Oregon, and was determined by decree made and entered in said last-mentioned court May 3, 1911. In the complaint in that suit the plaintiff alleged that lots 1 and 2, Section 15, Township 36 S., Range 3 W., of the Willamette Meridian, being the real property described in the complaint in the present suit as the property of the plaintiff, had been acquired by the plaintiff therein, to wit: the Condor Water & Power Company, for the purpose of carrying on its objects, purposes and as a public utility corporation, and that plaintiff needed said real property, and the water rights belonging thereto, for the purposes of which said corporation was organized, and that the demand for electric current and water for irri-

gation was increasing and the plaintiff would be required to meet said demand.

That neither the Condor Water & Power Company, plaintiff in said action, nor any of its successors to and including the plaintiff in the pending litigation, The California Oregon Power Company, have made any attempt to construct works for the application of the waters of the Rogue River to a beneficial object.

IX.

That prior to the 21st day of July, 1930, the defendant Beaver-Portland Cement Company, under and in accordance with the terms of its executory contract with defendant City of Gold Hill, was proceeding to construct from the west bank of Rogue River on the property of defendant City of Gold Hill, a wing-dam extending [61] to, but entirely west of the thread of the stream.

X.

That on the 21st day of July, 1930, for the purpose of developing the power from the waters of Rogue River to which the defendant City of Gold Hill claimed to be entitled by adjudication and by permits from the State Engineer of the State of Oregon, and to permit the free flow of, and thereby to utilize, the waters of Rogue River to be diverted by the wing-dam in process of construction, and to procure an available supply of broken rock for the erection of a structure on the site of the old crib, as defined by said final decree in case E.-8991, defendant Beaver-Portland Cement Company exploded certain charges of dynamite in the rock

reefs, obstructing the flow of the waters of Rogue River on the west side thereof, said explosion being entirely west of the thread of the said stream, and that by such explosion the reef rocks were broken and shattered, and the rocks so broken and shattered lie in the channel of Rogue River, west of the thread of the stream.

XI.

That the said explosions and shattering of rock did not remove lateral support from the rock and soil of plaintiff lying under the waters of Rogue River and constituting the bed thereof, nor do any injury irreparable, or otherwise, to any of plaintiff's property.

XII.

That plaintiff has failed to prove any property rights vested, or otherwise, in or to the waters of Rogue River at the point in controversy, or to the usufruct thereof, except that the plaintiff did prove that it is the owner and in legal possession of its said lands abutting upon Rogue River and extending under the [62] waters thereof to the thread of the stream.

XIII.

That the removal of the shattered rock, the result of the exploding of dynamite by defendant Beaver-Portland Cement Company, and now lying in the channel of Rogue River on the west side of the thread of the stream, and upon the bed of the stream west of the thread thereof, and the removal by the defendant of further rock obstructions to the flow

of Rogue River entirely west of the thread of the stream, will not affect the location of the boundary between plaintiff and defendant City of Gold Hill, if such operations shall not be so conducted and the plant proposed to be constructed by the defendants shall not be so operated as to reduce the surface elevation of Rogue River at the point of diversion of the most northerly end of the wing-dam proposed to be constructed by the defendants from the west bank of Rogue River below an elevation of 1070.056 feet above sea level, as computed from the bench at Gold Hill, Oregon, as revised and corrected by the United States Geological Survey, such elevation being 1069 feet above sea level based upon the original approximate elevation indicated on said bench mark, the said point at which said surface elevation shall not be so drawn down below said elevation is a point immediately east of the point where the thread of the stream intersects a line 390 feet south of the north line of said Section 15, and parallel therewith; that neither the wing-dam nor the plant proposed to be constructed shall be so constructed, maintained or operated as to permit any of the waters of Rogue River to flow from the east channel thereof to the west channel below the above-designated point of diversion; that the said injunction against the defendants shall apply to the successors in interest of the defendants, and each of them, in the ownership or possession of lots 6, 7 and 8, Section 15, Township 36 S., Range 3. W., of the Willamette Meridian, and in the ownership, [63] possession or operation of

any electrical or other plant operated upon said lots for the manufacture of electricity and other power, and to the agents, servants and employees thereof, and all others acting in their aid or behalf.

And based upon the foregoing Findings of Fact, the court makes and enters the following conclusions of law:

I.

That the plaintiff is not entitled to any injunctive relief against the defendants, or either of them, prayed for in the complaint.

II.

That the temporary restraining order heretofore issued herein, should be discharged.

III.

That the thread of the stream is the boundary between the owners of land upon opposite sides of a non-navigable stream, and it is not changed merely because water is diverted in large quantities for irrigation or power use; it remains still at the center of the natural bed of Rogue River at the lowest natural stage of the waters; that plaintiff is entitled to access to the waters of Rogue River upon its said lands.

IV.

That the defendants, and each of them, should be enjoined from so constructing its proposed works, and/or from so operating such works when constructed as to reduce the elevation of Rogue

River at the point of diversion at the most northerly end of the wing-dam proposed to be constructed by the defendants from the west bank of Rogue River to the thread of the stream below [64] an elevation of 1070.056 feet above sea level as computed from the bench of the city of Gold Hill, Oregon, as revised and corrected by the United States Geological Survey, such elevation corresponding to 1069 feet above sea level based upon the original approximate elevation indicated on said bench mark, the said point at which said surface elevation shall not be so drawn down below said elevation being a point immediately east of the point where the thread of the stream intersects a line 390 feet south of the north line of said Section 15, and parallel therewith; that neither the wing-dam nor the plant proposed to be constructed, shall be so constructed, maintained or operated as to permit any of the waters of Rogue River to flow from the east channel thereof to the west channel below the above designated point of diversion; that the said injunction against the defendants shall apply to the successors in interest of the defendants, and each of them, in the ownership or possession of lots 6, 7 and 8, Section 15, Township 36 S., Range 3 W., of the Willamette Meridian, and in the ownership, possession or operation of any electrical or other plant operated upon said lots for the manufacture of electricity and other power, and to the agents, servants and employees thereof, and all others acting in their aid or behalf.

V.

That the defendants should recover of and from the plaintiff their costs and disbursements.

JAMES ALGER FEE,

Judge of the United States District Court for the District of Oregon.

Filed March 11, 1932. [65]

AND AFTERWARDS, to wit, on Friday, the 11th day of March, 1932, the same being the 5th judicial day of the regular March term of said court,—Present, the Honorable JAMES ALGER FEE, presiding,—the following proceedings were had in said cause, to wit:

In the District Court of the United States for the District of Oregon.

No. E.-9126.

THE CALIFORNIA OREGON POWER COMPANY, a Corporation Duly Organized and Existing Under and by Virtue of the Laws of the State of California,

Plaintiff,

vs.

BEAVER-PORTLAND CEMENT COMPANY, a Corporation Duly Organized and Existing Under and by Virtue of the Laws of the State of Oregon, and CITY OF GOLD HILL, OREGON, a Municipal Corporation Existing Under the Laws of the State of Oregon,

Defendants.

DECREE.

The above-entitled matter having come on for hearing before the Honorable James Alger Fee, Judge of the District Court of the United States, for the District of Oregon, and the court having made and entered its findings of fact and conclusions of law,—

IT IS NOW, THEREFORE, ADJUDGED AND DECREED that the temporary restraining order heretofore issued herein, be, and the same is hereby, discharged and dismissed; that the plaintiff have no other relief herein, except as hereinafter especially decreed; that the defendants, and each of them be, and are hereby enjoined from so constructing its proposed works, and/or from so operating such works when constructed as to reduce the elevation of Rogue River at the point of diversion at the most northerly end of the wing-dam proposed to be constructed [66] by the defendants from the west bank of Rogue River to the thread of the stream below an elevation of 1070.056 feet above sea level as computed from the bench of the City of Gold Hill, Oregon, as revised and corrected by the United States Geological Survey, such elevation corresponding to 1069 feet above sea level based upon the original approximate elevation indicated on said bench mark, the said point at which said surface elevation shall not be so drawn down below said elevation being a point immediately east of the point where the thread of the stream intersects

a line 390 feet south of the north line of said Section 15, and parallel therewith; that neither the wing-dam nor the plant proposed to be constructed, shall be so constructed, maintained or operated as to permit any of the waters of Rogue River to flow from the east channel thereof to the west channel below the above-designated point of diversion; that this injunction against the defendants shall apply to the successors in interest of the defendants, and each of them, in the ownership or possession of lots 6, 7 and 8, Section 15, Township 36 S., Range 3 W., of the Willamette Meridian, and in the ownership, possession or operation of any electrical or other plant operated upon said lots for the manufacture of electricity and other power, and to the agents, servants and employees thereof, and all others acting in their aid or behalf.

It is also ADJUDGED AND DECREED that the defendants shall have their costs and disbursements herein taxed at $447.65.

JAMES ALGER FEE,
Judge of the United States District Court for the District of Oregon.

Filed March 11, 1932 [67]

AND AFTERWARDS, to wit, on Friday, the 11th day of March, 1932, the same being the 5th judicial day of the regular March term of said court,—Present, the Honorable JAMES ALGER FEE, presiding,—the following proceedings were had in said cause, to wit:

[Title of Court and Cause.]

MINUTE ORDER—MARCH 11, 1932—ORDER CONTINUING IN FORCE PRELIMINARY INJUNCTION.

The court having filed herein its findings of fact and conclusions of law and having rendered its opinion,—

IT IS ORDERED that the preliminary injunction heretofore issued in this cause be continued in full force for a period of fifteen days to permit the said plaintiff to perfect an appeal from the said decree.

JAMES ALGER FEE,
Judge.

Filed March 11, 1932. [68]

AND AFTERWARDS, to wit, on the 23d day of March, 1932, there was duly filed in said court a petition for an order allowing appeal, in words and figures as follows, to wit:

[Title of Court and Cause.]

PETITION FOR ORDER ALLOWING APPEAL.

To the Honorable JOHN H. McNARY and JAMES ALGER FEE, Judges of the Above-entitled Court:

The California Oregon Power Company, a Cali-

fornia corporation, and citizen of the State of California, the above-named plaintiff, being aggrieved by the judgment and decree filed and entered herein on the 11th day of March, 1932, —,

DOES HEREBY APPEAL from said judgment and the whole thereof to the United States Ciruit Court of Appeals for the Ninth Circuit, for the reason and upon the grounds specified in the plaintiff's assignment of errors accompanying this petition, and does hereby pray that an order be made and entered herein allowing the said appeal; that a citation issue herein and a transcript of the record herein be sent to the said United States Circuit Court of Appeals for the Ninth Circuit; that said order fix the amount of bond to be given herein covering the costs and disbursements upon such appeal, and for a supersedeas bond, staying execution upon the judgment for costs and disbursements entered herein.

AND WHEREAS, at the time of the entry of the aforesaid judgment and decree, an order was duly made and entered herein that the preliminary injunction heretofore issued in the cause be continued in full force for a period of fifteen (15) days to permit the above-named plaintiff to perfect his appeal from said decree.

NOW, THEREFORE, the above-named plaintiff does further [69] pray that said preliminary injunction order be restored and continued in force during the pendency of such appeal, upon the plaintiff depositing its bond in such sum as the court may consider proper for the security of the rights

of these defendants if said restraining order shall be upon said appeal vacated.

And the appellant respectfully asks that such other and further order be made as shall be proper in the premises.

Respectfully submitted,

A. E. REAMES,

Attorney for the Plaintiff.

Upon consideration of the foregoing petition,—

IT IS HEREBY ORDERED AND DECREED that the plaintiff's said appeal from said judgment and decree, mentioned in said petition, be and the same is allowed upon the plaintiff's filing herein a good and sufficient undertaking in the sum of One Thousand Dollars ($1,000.00), covering the costs and disbursements upon appeal, and for a supersedeas bond staying execution upon the judgment for costs and disbursements entered in said decree, which bond shall be subject to the approval of the above-entitled court.

That upon the filing of said undertaking a citation issue upon such appeal and a transcript of the record of this cause be forwarded to the United States Circuit Court of Appeals for the Ninth Circuit.

The matter of the application of the plaintiff for a continuance of the preliminary injunction is covered by a separate order made concurrently herewith and hereby referred to him and made a part hereof.

Dated this 23d day of March, 1932.

JAMES ALGER FEE,
United States District Judge.

Filed March 23, 1932. [70]

AND AFTERWARDS, to wit, on the 23d day of March, 1932, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit:

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

The plaintiff being now in the act of filing with the Clerk of this court his petition for an order allowing his appeal from the decree made and entered herein on the 11th of March, 1932, to the United States Circuit Court of Appeals for the Ninth Circuit, does hereby make the following assignments of error upon such appeal, to wit:

The Court erred in said Decree as follows:

I.

In dissolving the temporary injunction or restraining order heretofore issued herein.

II.

In decreeing that the plaintiff have no other relief herein except the permanent injunction made and entered in said decree restraining the acts therein enjoined.

III.

In adjudging and decreeing that the defendant shall have their costs and disbursements therein taxed at $———.

IV.

In failing to decree that ever since the 11th day of March, 1921, the plaintiff has been and now is the owner in fee simple, and entitled to the possession of Lots 1 and 2 in Section 15, Township 36 South of Range 3 West of Willamette Meridian, [71] in Jackson County, Oregon, and that said lands are situated along and border upon the banks of Rogue River, which is a non-navigable stream. That plaintiff's said ownership and right of possession extends under the waters of the said stream to the middle of the channel or thread of the current of said stream; that said ownership and right of possession includes the bed of said stream lying in front of said Lots 1 and 2 to the said thread of said stream; that said lands are riparian to such stream, and the plaintiff's said ownership and right of possession extends to and includes the riparian rights belonging to said lands so situated. That the plaintiff as such riparian owner is entitled to have said stream flow over and upon said lands in its natural channel and as it has been wont to do, undiminished in quantity and quality; that the western border of plaintiff's said lands is the thread of the said stream; that the plaintiff in the ownership of said land is entitled to have said thread of of said stream continued in its present location, and that said thread of said stream cannot be changed by the

acts of the defendants, or either of them, in the blasting or removing of rock from the natural channel of said stream.

V.

That the plaintiff has been, during all the times since the said 11th day of March, 1921, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California, and a citizen of that state. That it is a public service corporation having the powers of eminent domain, and is a public utility in Oregon, and as such has complied with the Oregon laws fixing the rates for the sale and distribution of electric current in Oregon; that as such public service corporation, the plaintiff needs and requires its said lands and the waters of said stream in connection with the manufacture of such electric current for such public purposes; that it is entitled to so use said waters upon its said lands as such public utility for such purposes; that the shattered rock in the [72] bed of said stream, and opposite said Lots 1 and 2 and west of the thread of said stream where the defendant Cement Company carried on its operations in the blasting of the rock bed of said river, mentioned in the complaint herein, and referred to in Paragraph XVIII of the further and separate answer of the defendants to the plaintiff's complaint herein, cannot be removed without the changing of the thread of said stream, which is the west boundary to plaintiff's said lands, nor without withdrawing from plaintiff's said lands said waters.

VI.

In not restraining and enjoining the defendants and each thereof from carrying on any further or other blasting of the bed of said stream in front of said Lots 1 and 2 and from removing from its natural place in said stream any portion of the shattered rock bed of said stream as the same now lies in place therein; or from doing any other act or thing that would change the thread of said stream or deprive the plaintiff and its successors in the ownership of its said lands from the natural flow, use and enjoyment of the waters of said stream for said public purposes.

VII.

In not enjoining the defendant Cement Company from constructing or maintaining any power plant on said river at its proposed site, as established in this case, whereby the waters of said stream could at low water be entirely withdrawn from plaintiff's said Lots 1 and/or 2. Said decree should have provided that it has been established herein that the defendant Cement Company intends to and will, unless restrained, so establish an electric plant at its said site, so that the flow of the waters of said stream can be regulated from the defendant Cement Company's cement plant and by which regulation all of the waters of said stream might be withdrawn from plaintiff's said lands, to [73] plaintiff's great and irreparable injury and damage, and all such acts should have been in said decree restrained and perpetually enjoined; that the injunction which should have been entered in said decree should have

been made to apply not only to the defendants and each thereof, but to their successors in interest in and to Lots 6, 7 and 8 of said Section 15.

VIII.

That said judgment and decree herein should have granted plaintiff a judgment against the defendants and each thereof for plaintiff's cost and disbursements herein taxed, and the restraining order heretofore, on the 26th day of July, 1930, should have been in said decree made a permanent injunction against each of the defendants, their successors in interest and assigns in the ownership of said Lots 6, 7 and 8 in said Section 15, and against all others in the aid or behalf of any of them.

Respectfully submitted,

A. E. REAMES,

Attorney for the Plaintiff.

Filed March 23, 1932. [74]

AND AFTERWARDS, to wit, on the 25th day of March, 1932, there was duly filed in said court a prayer for reversal, in words and figures as follows, to wit:

[Title of Court and Cause.]

PRAYER FOR REVERSAL.

Comes now the plaintiff, California Oregon Power Company, and prays that the decree heretofore on the 11th day of March, 1932, entered herein, be in

all things reversed; that the judgment for costs and disbursements herein taxed at $447.65 be reversed and that plaintiff have judgment for its costs and disbursements herein; that the temporary injunction order heretofore entered herein on July 26th, 1930, be continued in force and made final herein; that the plaintiff have a decree to the effect that ever since the 11th day of March, 1921, the plaintiff has been and now is the owner in fee simple and entitled to the possession of Lots 1 and 2 in Section 15, Township 36 South of Range 3 West of Willamette Meridian, in Jackson County, Oregon, and that said lands are situated along and border upon the banks of Rogue River, which is a non-navigable stream; that plaintiff's said ownership and right of possession extends under the waters of the said stream to the middle of the channel or thread of the current of said stream; that said ownership and right of possession includes the bed of said stream lying in front of said Lots 1 and 2 to the said thread of said stream; that said lands are riparian to such stream, and the plaintiff's said ownership and right of possession extends to and includes the riparian rights belonging to said lands so situated; that the plaintiff as such riparian owner is entitled to have said stream flow over and upon said lands in its natural channel and as it has been wont to do, undiminished [75] in quantity and quality; that the western border of plaintiff's said lands is the thread of the said stream; that the plaintiff in the ownership of said land is entitled to have said thread of said stream continued in

its present location, and that said thread of said stream cannot be changed by the acts of the defendants, or either of them, in the blasting or removing of rock from the natural channel of said stream; that the plaintiff has been, during all the times since the said 11th day of March, 1921, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California, and a citizen of that state; that it is a public service corporation having the powers of eminent domain, and is a public utility in Oregon, and as such has complied with the Oregon laws fixing the rates for the sale and distribution of electric current in Oregon; that as such public service corporation, the plaintiff needs and requires its said lands and the waters of said stream in connection with the manufacture of such electric current for such public purposes; that it is entitled to so use said waters upon its said lands as such public utility for such purposes; that the shattered rock in the bed of said stream, and opposite said Lots 1 and 2 and west of the thread of said stream where the defendant Cement Company carried on its operations in the blasting of the rock bed of said river, mentioned in the complaint herein, and referred to in Paragraph XVIII of the further and separate answer of the defendants to the plaintiff's complaint herein, cannot be removed without the changing of the thread of said stream, which is the west boundary to plaintiff's said lands, nor without withdrawing from plaintiff's said lands, said waters.

That a decree be entered herein restraining and enjoining the defendants and each thereof from carrying on any further or other blasting of the bed of said stream in front of said Lots 1 and 2 and from removing from its natural place in said stream any portion of the shattered rock bed of said [76] stream as the same now lies in place therein; or from doing any other act or thing that would change the thread of said stream or deprive the plaintiff and its successors in the ownership of its said lands from the natural flow, use and enjoyment of the waters of said stream for a public purpose herein; enjoining the defendant Cement Company and its successors from constructing or maintaining any power plant on said river at or near its proposed site which shall draw the water of said stream, at low water, entirely off of plaintiff's said Lots 1 and/or 2; that a decree be entered to the effect that the defendant Cement Company will, unless restrained, so establish its electric plant at said site in such manner that the flow of the water of said stream can be so regulated by it from its cement mill and by which regulation all of the water of the said stream may be withdrawn from plaintiff's said land at low water to plaintiff's great and irreparable injury and damage, and enjoining perpetually all of such acts; that a decree be entered herein in accordance with the prayer of the complaint and the assignment of errors heretofore filed herein on the 23d day of March, 1932, and that such

decree grant such other and further relief as shall be just and equitable in the premises.

A. E. REAMES,
Attorney for Plaintiff.

Filed March 25, 1932. [77]

AND AFTERWARDS, to wit, on Wednesday, the 23d day of March, 1932, the same being the 14th judicial day of the regular March term of said court,—Present, the Honorable JAMES ALGER FEE, United States District Judge, presiding,—the following proceedings were had in said cause, to wit:

[Title of Court and Cause.]

ORDER CONTINUING INJUNCTION DURING APPEAL AND FIXING BOND.

Upon the application of the plaintiff for a continuance of the preliminary injunction herein during the pendency of the appeal of this cause to the United States Circuit Court of Appeals for the Ninth Circuit,—

IT IS ORDERED that the said restraining order which was originally issued July 26th, 1930, and which was continued in force by the order of March 11th, 1932, for a period of fifteen (15) days after said date, be and the same is restored and continued in full force and effect during the pendency of this appeal, and subject to the order of the said Circuit Court of Appeals, conditioned that the

plaintiff shall, while said preliminary injunction is still in full force and effect, under said order of March 11th, 1932, file herein a good and sufficient undertaking in the sum of $9,000, to be approved by the Court, to the effect that the plaintiff will pay to the above-named defendants all damages which they may sustain by reason of said injunction order being in force during the pendency of such appeal if the said injunction order shall be finally determined to been wrongful. The bond upon appeal and said injunction bond herein provided for may be combined in the one instrument in the total amount of the said appeal bond as fixed by this court, plus the amount of the injunction bond as herein fixed.

Dated this 23d day of March, 1932.

JAMES ALGER FEE,
United States District Judge.

Filed March 23, 1932. [78]

AND AFTERWARDS, to wit, on the —— day of March, 1932, there was duly filed in said court a cost, supersedeas and injunction bond, in words and figures as follows, to wit:

[Title of Court and Cause.]

COST, SUPERSEDEAS AND INJUNCTION BOND.

The plaintiff, having petitioned for and having been allowed an appeal from the decree entered

herein on the 11th day of March, 1932, and its bond for costs on appeal and for a supersedeas bond having been fixed in the sum of One Thousand ($1,000.00) Dollars, and having petitioned for an order continuing in force the preliminary injunction heretofore, on July 26th, 1930, entered, and the Court having made an order continuing in effect said preliminary injunction pending appeal and fixing the injunction bond therefore in the sum of Nine Thousand ($9,000.00) Dollars, and having ordered that said two bonds, in the aggregate sum of Ten Thousand ($10,000.00) Dollars, might be included in the one undertaking,—

NOW, THEREFORE, we, the California Oregon Power Company, as principal, by A. E. Reames, its attorney of record, and the United States Fidelity & Guaranty Company, a Maryland surety company, qualified in Oregon to write this bond, do hereby undertake that if the said The California Oregon Power Company shall fail to prosecute its said appeal to effect, that we will pay all damages and costs which the defendants, or either of them, shall sustain, not exceeding the sum of One Thousand ($1,000.00) Dollars; that if upon such appeal said injunction order shall be held to have been wrongful and without sufficient cause, we will pay to the defendants all damages which they may sustain during the pendency of said appeal, not exceeding the sum of Nine Thousand ($9,000.00) Dollars. [79] This bond is in a total sum of $10,000.00, covering all costs and disbursements on appeal; the judgment for costs heretofore rendered herein and the dam-

ages that may result from said injunction during the continuance thereof.

IN WITNESS WHEREOF The California Oregon Power Company has executed this instrument, by its attorney, and the United States Fidelity & Guaranty Company has executed this instrument by its attorney-in-fact, who has affixed its seal thereto this 23d day of March, 1932.

THE CALIFORNIA OREGON POWER COMPANY.

By A. E. REAMES,
Its Attorney.

[Seal, United States Fidelity & Guaranty Company]

UNITED STATES FIDELITY & GUARANTY COMPANY.

By G. CUNNINGHAM,
Its Attorney-in-fact.

Countersigned:

By G. CUNNINGHAM,
Resident Agent.

The foregoing undertaking is hereby approved. Dated March 23, 1932.

JAMES ALGER FEE,
District Judge.

Filed March 23, 1932. [80]

AND AFTERWARDS, to wit, on the 25th day of March, 1932, there was duly filed in said court a praecipe for transcript, in words and figures as follows, to wit: [81]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To G. H. Marsh, Clerk of the Above-entitled Court:

Please include in the transcript on appeal herein the following:

1. Bill of complaint and restraining order (Preliminary injunction dated July 26, 1930).
2. Stipulation extending the time within which defendants may answer and that the hearing upon plaintiff's application for an injunction fixed in said injunction order for the 30th day of July, 1930, shall be postponed until a date in September to be determined as provided in the stipulation, and continuing the injunction in full force and effect until that hearing, filed September 18th, 1930.
3. Order deferring decision on application to dissolve injunction, filed September 19th, 1930.
4. Answer of defendants.
5. Replication.
6. Transcript of testimony as approved by the court.
7. Opinion of the court filed March 11th, 1932.
8. Findings of fact and conclusions of law filed March 11th, 1932.
9. Final decree entered March 11th, 1932.
10. Order continuing preliminary injunction for 15 days to permit plaintiff to perfect appeal from decree, entered March 11th, 1932.

11. Petition for order allowing appeal, with order allowing appeal and fixing bond on appeal, filed March 23, 1932. [82]
12. Assignment of errors, filed March 23, 1932.
13. Prayer for reversal.
14. Order continuing the temporary injunction pending appeal to the United States Circuit Court of Appeals for the Ninth Circuit and fixing bond therefor; entered March 23d, 1932.
15. Citation on appeal with proof and admission of service, filed March 23d, 1932.
16. Bond on appeal and approval thereof.
17. Bond on injunction and approval thereof.
18. Stipulation relative to statement of evidence.
19. Order directing printing of certain exhibits and/or forwarding of the other exhibits.

A. E. REAMES,
Attorney for the Plaintiff.

Due and legal service of the within is hereby acknowledged this twenty-fifth day of March, 1932.

JOHN K. KOLLOCK,
Attorney for Defendants.

Filed March 25, 1932. [83]

AND AFTERWARDS, to wit, on the 17th day of May, 1932, there was duly filed in said court a statement of the evidence, in words and figures as follows, to wit: [84]

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1—Containing two maps filed since former trial.
Identified 3

2—Map showing thread of stream and blasted area in yellow.
Identified 19
Received 21

3—Record at hearing before Judge Bean.
Identified 12
Received 12

4—Photo of area before blasting.
Identified 13
Received 13

5—Photo of area after blasting.
Identified 14–5
Received 15

6—Drawings, 7 sheets (Plffs. Ex. 10 in former trial).
Identified 16
Received 18

7—Same as Defendants' Exhibit "B."

8—Photo of blasted area—close-up.
Identified.
Received 21

9—Map showing effect of complete diversion.
Identified 22
Received 23

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EXHIBITS—Continued:

10—Map showing effect of partial diversion.
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11—Cross-section on A–A, upper reef and across river.
Identified 24
Received 26

12—Cross-section showing blasted area and effect of removing the same.
Identified 26
Received 26–7

13—Copy of blue-print showing shattered area and portion of reef at C–C—part of maps just filed before trial.
Identified 28
Received 92

14—Public Service Commission Rules, Regulations, etc.
Identified 39
Received 39

15—Decree of May 3, 1911, Judge Bean. (Plffs. Ex. 7 in first trial).
Identified 40
Received 40

16—Decree of May 20, 1929, Judge Bean after mandate of C. C. A.
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17—Judgment-roll in old case E.-8891.
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18—Circular letter to voters of City of Gold Hill. (Tr. 111.)
Identified 44–45
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19—Field-notes of Allen.
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20—Map, blue-print, which shows flow of river through channels and openings.
Identified 136
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20½—Proof of claim #30 in Rogue R. Adjudication.
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21—Photo by Olsen, bridge, soundings, etc.
Identified 167
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22—Tracing or profile, showing soundings, bottom of river.
Identified 168
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23—Plat showing profile of reef as survey showed.
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24—Field-notes (withdrawn by agreement, see page 182).
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25—Photo by Olsen, illustrating method of measuring bedrock elevations at reef.
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26—Photo—same purpose as 25.
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27—Stream flow records.
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28—Certified township plat of T. 36 S. R. 3 W. of W. M.
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29—Certified copy of judgment-roll in original Condemnation case.
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30—Schedule of dates showing when the various suits were started by the parties over the property.
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	Identified	74
C	Photograph showing concrete work	
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D	Photograph of River looking south toward entrance of canal	
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E	Map	
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F	Cross-section from point on center group of islands	
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G	Photograph, panoramic view from west bank prior to blasting	
	Identified	90
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H	Aerial Mosaic resultant of several photos	
	Identified	93–4
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J Sectional aerial photo showing increased flow in West channel from opening in diversion dam
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K Copy of Rating of effective head at different stages of river
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L Graph resultant of power that can be delivered all losses considered
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M Plat of discharge by months of the river, 1906 to 1925
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N Certified copy of permit No. 3275 and 7942
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O Decree of Adjudication, Rogue River
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P Amended plan of diversion filed Apr. 8, 1931
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R. Deed from McClure to City of Gold Hill
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S Deed from Oregon Water & Power to Rogue River Public Service Corpn.
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T Deed Maguire, Master in Chancery to Rountree
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U Deed Rountree to Irrigation & Power Co.
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V Deed Irrigation and Power Co. to City of Gold Hill
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W Patent, United States to Fredenburg
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EE Judgment-roll in case No. 3098, decree of May 11, 1911
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[Title of Court and Cause.]

CONDENSED STATEMENT OF THE EVIDENCE SUBMITTED FOR THE COURT'S APPROVAL.

BE IT REMEMBERED, this cause came on for trial before the Honorable James Alger Fee, Judge of the above-entitled court, on Thursday, the 23d day of April, 1931, at the hour of 9:30 A. M., plaintiff being represented by Mr. A. E. Reames and the defendant by Messrs. John K. Kollock and Gus Newbury.

WHEREUPON, the evidence in the cause was taken, which, upon being reduced to narrative form, is in substance as follows, to wit: [90—1]

TESTIMONY OF W. H. MUIRHEAD, FOR PLAINTIFF.

W. H. MUIRHEAD was called by the plaintiff as a witness and testified in substance as follows:

Examination by A. E. REAMES, Attorney for the Plaintiff.

He stated that he was Vice-president and Treasurer of Beaver-Portland Cement Company, defendant herein, hereinafter in this narrative statement of the evidence referred to as "defendant Cement Company."

He testified that he was a witness at the former trial of this case before His Honor Judge Bean; that at that trial said defendant's engineer, Allen, defined the area of the river bottom that had been shattered by the explosion of dynamite alleged in the complaint. He stated that Allen attempted to describe the area so blasted, but that it was irregular and difficult to describe. Asked if defendant Cement Company intended to do more blasting he answered (Tr., page 2), possibly, that the holes are irregularly shaped, and it may be necessary to remove rock where it is found the channel is irregular, and to square it up; that the company intended to do work below; would do such work farther down the stream as was necessary to complete the project, but at the point of the prior blasting as described by Allen, it was the intention to blast out enough to pass the amount of water that

(Testimony of W. H. Muirhead.)

will be required to pass through when the company put the concrete structure at the point which it would later designate. That it would block off the flow from the east [91—2] to the west side of the river; that this was the intention in blasting the area.

Reminded that he had not answered the question, and asked again to answer it he stated that "we" expect to square it up and we farther may have to do some blasting when we put our concrete work in; may have to do some drilling when we put it in; may do some blasting to remove loose rock to get over and build a crib; that we did not get sufficient out of what we did blast.

At plaintiff's request defendants' counsel produced maps that had been filed with the State Engineer since the former trial of this cause before His Honor Judge Bean (October 14, 1930), and they were marked

"PLAINTIFF'S EXHIBIT 1 FOR IDENTIFICATION."

(Containing 2 maps. Tr. 5.)

Counsel for plaintiff called attention of the witness to the first map in Exhibit 1, which contained the legend:

"This area to be excavated 6 feet below low water or to elevation of 1063.5 plus or minus."

His attention was directed to the arrow pointing to certain rocks and to the heavy line on the map and also to the two light lines. He was then asked to point out what operation the company intended

(Testimony of W. H. Muirhead.)

to indicate by said legend as to the portion of the area to be removed; whether it was all of the portion embraced within the heavy lines or [92—3] were embraced in the light lines. He answered:

In the heavy lines; that the light lines represented the boundaries of the reef and islands as they existed prior to the shot, and the solid light lines represented the area that is now in a shattered state, and it is difficult to say whether it is in the original channel or solid rock but that now it is apparently solid because of the "cast up" from the blast.

Asked how wide the excavation will be, he answered:

"It is our intention to shoot a stretch through there approximately thirty feet wide and five deep below the water stage at the date of our engineer's estimate, the original estimate which was 1069.40." That his engineer could testify more accurately, but that it was approximately an area thirty feet wide and five feet deep and as long as was necessary to go through there which was approximately 280 feet; that there was a diagonal stretch that they also blasted out which, of course, should take the measure at the maximum width, which would be more than thirty feet; that the area was originally the channel which was passing thirty or forty or more second-feet of water; that we blasted simply to utilize such natural passage that was there to save power.

He testified that the 1063.5 on the exhibit is a

(Testimony of W. H. Muirhead.)

foot lower elevation than they intended to go when they put in the blast. The Court asked if he meant that he was going down a foot lower than was intended at the time of the former trial, being the one referred to above. Witness answered that our holes were down five feet below that level, and the engineer to get this six feet (the engineer having intended to have an area six feet below), the company in shooting made [93—4] the mistake of only getting five feet.

Asked by counsel if the holes were not drilled eight feet deep, he answered five feet; that the holes were of varying depth; they may have gone from two feet; some were drilled with three feet of water over the top of the holes; that this would be only two feet; other holes were drilled in the reef above the surface of the water several feet; these holes may have been nine feet deep in solid rock, but all went to the same level, five feet below the water stage 1069.00. (Counsel agree that the witness intended the "1069.00" to mean surface water elevation.)

At the request of the Court he marked the blasted area to be removed, saying:

A. I shall mark the area of blasted rock that is to be removed "A," this area being that enclosed by the solid lines at this point." (Tr. 8.)

Asked by his counsel if he referred to the dotted lines, he answered: "That is the same area but the dotted lines indicate the line of the shore and the rock reef, before the blast."

The witness stated that the area excavated should

(Testimony of W. H. Muirhead.)

be that which the company's engineer Allen had, at the said former trial, described by metes and bounds, but that the witness could not say accurately whether it was or not exactly the same that it may be that the area which the engineer has shown in the solid line would go beyond the points that have been shot; that the engineer shows the rock to be removed and some of that rock was cast over from the blast; that the company blasted a channel thirty feet wide and some of the [94—5] rock might have been thrown fifty feet, but that was not blasted area, but the company would gather rock along an area more than thirty feet wide and maybe that is what may be shown on the map.

TYPE OF PLANT TO BE CONSTRUCTED.

He testified that his company intended to build a hydro-electric plant for the manufacture of electric power by the use of turbines and generator with the use of the flow of the water, and a given head and volume; that the turbines will be equipped with gates that will be automatically operated according to the amount of power used at the cement mill; that when the electrical load is taken at the cement mill the amount of water required to make that quantity of electricity will automatically be let into these turbines or wheels and only that amount of water; that it will operate in that way except that there is a maximum which the company can take because if the company drew more than a certain amount of water it would drop its head and lose efficiency. That there was a certain point

(Testimony of W. H. Muirhead.)

beyond which his company could not open the gates and still operate the plant; that it is a type of plant that when not in operation it has no water passing through the wheels; that is,—when no electrical load is being drawn at the cement mill there would be no water passing through the turbines; the gates on the turbines would then be shut; the water would be coming down the canal but would be going over the spillway adjacent to the power plant. The company has one gate at the entrance of the canal, and there is another about one hundred fifty feet from the present generating plant; that it is there for [95—6] protection against floods, etc.

He testified that it is the intention of defendant Cement Company to deepen and widen the existing canal sufficient to pass the amount of water that it will be able to get with its diversion in the river as contemplated in this case.

Asked to state how much water this would be in second-feet, he replied it will be large enough to take all of the water that we have under permits and application, 1347 second-feet; not that the company expected to get that much all of the time, but to have it so that they can use it when it is available.

Asked if the plant was to be constructed so as to draw in and utilize 1347 second-feet, he answered: "Yes." (Tr. 11.)

Witness' attention was called by plaintiff's counsel to Paragraph XI at page 9 of said answer, where the amount of water which defendants claim

(Testimony of W. H. Muirhead.)

was stated 1397 second-feet. It was asked by plaintiff's counsel if there was a mistake in considering the amount of water 1347 second-feet. Witness answered that he was anxious to see that matter straightened out too, but that he believed it to be 1347 second-feet "usable at our diversion."

Asked if he wanted to see the allegation of the answer, witness stated "Can't our permits speak as to this?" His attention was so called to the paragraph and to the statement there that as to the right for 147 second-feet, 25 second-feet was deductible as having been sold to the Gold Hill Irrigation District, leaving 122 second-feet in the 147 second-foot appropriation. He was asked what he said about that. Defendants' counsel stated that he did not know as he wanted [96—7] to figure it out; that there may be an error; that the permits are actually there and they will state in full. Defendant's counsel stated that they always talked 1347 net, and it may be that they had a little more than they thought they had.

Asked by plaintiff's counsel what amount of power the cement comany required at its cement mill, he stated:

Approximately 1500 horse-power at the plant and about 425 additional at the quarry that seventy-five per cent of the amount of horse-power would practically indicate the amount embraced in kilowatts.

Asked as to the amount of power the cement company was required to supply to the City of Gold Hill at one cent per killowatt hour, he stated:

(Testimony of W. H. Muirhead.)

That it was supposed to give 20 kilowatts free and obligated to give any additional they want over that amount without limitation up to the company's capacity of one cent per kilowatt hour.

Asked whether he had answered the question as to how much his company intended to widen and lower its canal, he stated that he thought that he had said that it would increase its dimension to a size that would permit the taking of the entire amount of water that the cement company would be permitted to take by its permits and applications. (Counsel agree that the witness here refers to the permits; that the permits are now in the name of defendant City and covered by the contract between the defendants, copy of which is attached to the answer.)

Asked how much water he contemplated would be left on plaintiff's Lots 1 and 2 when the cement company's [97—8] plant should be in operation, he stated that he believed that at the very minimum there would be 122 second-feet flowing down the east side of the river on said lots, and witness then added: "And which we will have to permit to flow there as a fishway. I believe there is a law passed that requires that." (Tr. 14.)

Plaintiff's counsel having stated that he knew of no law requiring a fishway on plaintiff's land the witness answered:

"Well it has to be down the river at least, and of course it couldn't get down to the canal through our turbines, so we will leave that originally."" (Tr. 14.)

TESTIMONY TAKEN BEFORE JUDGE BEAN INTRODUCED.

The plaintiff's attorney then offered from the transcript taken before Judge Bean certain portions in which defendant cement company's engineer Allen had attempted to point out upon the map the territory that the defendant cement company would blast and remove the blasted rock from in order to carry out its plant.

A colloquy occurred in this court between counsel as to the introduction of that testimony, whereupon the [98—9] following proceedings were had and the testimony there shown was so introduced from the transcript of the evidence taken before Judge Bean, to wit:

"Mr. REAMES.—I desire now at this time, to offer in evidence, that part of the transcript of the former trial, beginning with the word 'Court,' on page 119, down to and including the word 'water level.'

(Reads): "'Court: I am not asking how large needed, but just asking if there is anything in the record, in the pleadings or evidence, by which the Court, if it decides in favor of the defendant in this case, can say just what blasting you should do there, so when you start in to do the blasting there wouldn't be another lawsuit whether a channel beginning at a certain point, running in a certain direction a certain number of feet, a certain width and a certain depth. A. I can describe that very

well. COURT: How would a surveyor find that point? Suppose an impartial surveyor were called upon to locate that, not familiar with the work at all, but understood surveying. Mr. ALLEN: Beginning at a point south 420 feet from the quarter corner between Sections 10 and 15, Township 36 South, Range 3 East W. M., thence west 10 feet to the point of beginning. COURT: You have the point of beginning. Mr. ALLEN: Thence west 10 feet, thence south 20 degrees west 220 feet; thence northwesterly along the westerly bank of the river a distance of 45 feet, thence north 20 degrees east, 160 feet to the northwest corner of the first island from the westerly shore of the river. COURT: How wide? Mr. ALLEN: Being a width of 30 feet in width. COURT: What depth? Mr. ALLEN: And a depth of 6 feet below low water.' COURT: What? Mr. ALLEN: Six feet below low water. COURT: How much is that below,— A. (Mr. Muirhead): That would be an elevation of 63. COURT: How much is that below the ordinary depth of the water? Mr. ALLEN: That is 12 feet in here. COURT: You said something about five feet. Mr. ALLEN: Holes were drilled five feet, so you have to take down six feet in order to get that area. Thence north seven degrees west, thirty feet to the point of beginning. By taking a line thirty feet in width and approximately 220 feet in length, and to be excavated to a depth of six feet below the water level.'" [99—10]

There was also offered in evidence from that transcript at that time the following from the testi-

mony of Allen, as begins on page 106 of the Judge Bean Transcript:

"Mr. REAMES.—I desire to offer in evidence also from this testimony the following: It is just question and answer from page 106 of the testimony of the witness Allen: 'How much more water would draw through there when you lower your canal than if you had not excavated this blasted out area? A. Well, would draw between—in other words, this whole thing is contemplated to draw the 1347 second-feet through it, at a stage of the river which will permit it.' And also the testimony of the witness Allen from pages 108 and 109: 'Q. How many second-feet of water do you require for operation? A. In the ultimate development of the 2000 kilowatts we require the entire 1347 second-feet; on the thousand we require 675 second-feet; thirteen hundred is 930 second-feet. COURT.—What is the capacity of your proposed development? A. It is proposed—the first development will be a thousand kilowatts plus the present three hundred. COURT.—I asked how much it was. I don't care how you arrived at your conclusion. I would like to know the amount. A. The first development [100—11] would be 1300 kilowatts. Q. Approximately how much horse-power? A. That would be seventeen hundred horse-power. COURT.—Is that the proposed capacity of the development as now planned? A. As now planned, yes. COURT.—Thirteen hun*d*ed? A. Wait a second; we planned for the full two thousand kilowatts. COURT.—You said you proposed to lower your canal; four

(Testimony of W. H. Muirhead.)

feet; or four and a half, whatever it was: now how much did you estimate that that would provide? A. It would provide 2,000 kilowatts delivered at the cement works. COURT.—That is the limit of your proposed development? A. Yes, that is the limit of our proposed development. COURT.—How many second-feet of water would you require for that? A. 1347 second-feet. In other words, we would not be able to develop that full amount of— COURT.—I am just asking what you propose to do." (Tr. 25.)

The record at the Judge Bean hearing was introduced as

PLAINTIFF'S EXHIBIT 3. (Tr. 26.) [101—12]

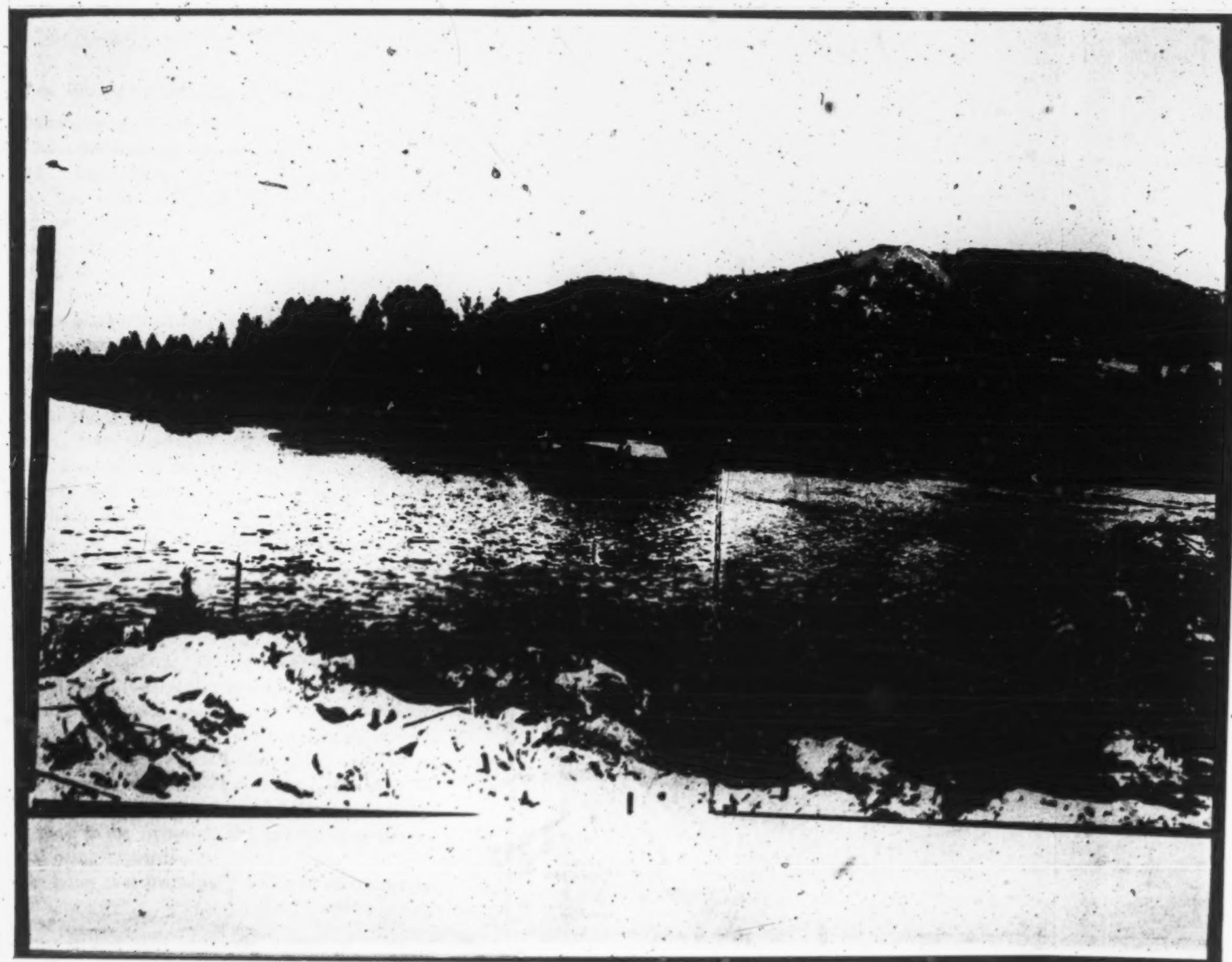
PHOTOGRAPHS SHOWING BLASTED AREA BEFORE AND AFTER BLASTING.

At this point plaintiff identified said two photographs, Exhibits 4 and 5 for Identification. (Tr. 26.)

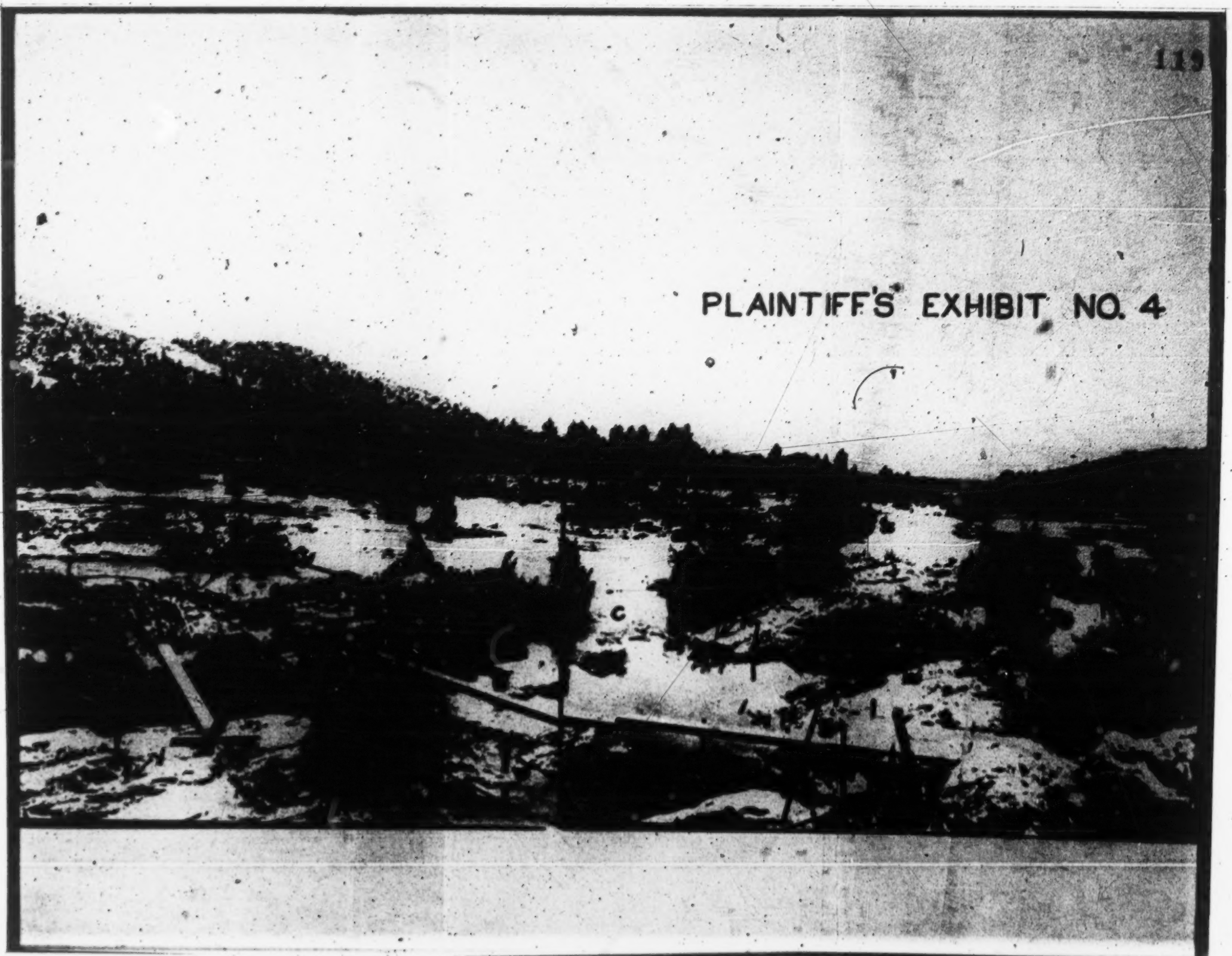
Mr. Muirhead testified that Exhibit 4 was taken a couple of days before the blasting occurred that it shows 220 holes from which wooden pegs protrude, these being the holes drilled to receive the dynamite. The witness pointed out the pegs in the picture showing the location of the holes.

The exhibit was received as

PLAINTIFF'S EXHIBIT 4. (Tr. 27.)



PLAINTIFF'S EXHIBIT NO. 4



(Testimony of W. H. Muirhead.)

The witness stated that the pegs marked "1" on Exhibit 4 are the type of pegs that were driven into holes that were drilled into the rock that some of them are deeper in the holes but they can be seen; that the holes were drilled with fairly uniform spacing throughout the area; that the entire area to be blasted was drilled at regular intervals, so that the blast would clean it out as clean as possible, and leave no more ridges or crevices than could be helped; that some of the holes were drilled in the water between the ledges of rock; that in proportion to the area involved there [102—13] were as many holes in between as there are shown on the rock. That is—as many under the water as on the rock; that they are shown in such places as he then designated on the exhibit by an arrow pointing to them with the number "1" in the area. Some holes were as much as three feet under the water and hence do not show in the photograph. That at first they had intended to excavate so as to get a greater capacity than they were getting by the present blasting. But now being only allowed to go to the thread of the stream, there was not the necessity for having such a large area as previously existed and since the holes were already drilled, the company only shot the one that it needed to make the area required, being those adjacent to the channels, because it would take less powder and make less rock to be removed, the powder and the removal being expensive.

The holes shot principally followed the channels;

that there is a natural channel there seven or eight feet deep at the point which the witness marked "A" but at the Court's suggestion changed to "B," and also marked another point as "C"; stated shots followed the channel and marked another "D"; that they endeavored to follow the channels with the blasting so as to keep the rock that would have to be hauled away to a minimum, using the natural channel. Some of the blasted holes were on the west bank, some were east of the west bank; that it was all solid rock with the exception of a few indentations; that it is solid bedrock.

Shown Plaintiff's Exhibit 5 for Identification (photograph) he stated that it was taken three days after [103—14] the explosion and was to show the same area covered by Exhibit 4; that the angle from which the picture was taken was slightly different.

EXHIBIT 5 WAS HERE INTRODUCED. (Tr. 30.)

PLAINTIFF'S EXHIBIT NO. 5

(Testimony of W. H. Muirhead.)

The witness stated that the two photographs, Exhibits 4 and 5, represent the condition before and the condition following the blasting. (Tr. 30.) That the date of the taking of the picture is on each exhibit, Exhibit 4, July 13, 1930, Exhibit 5, July 24, 1930, and that the explosion occurred on the 21st of July.

CONTRACT BETWEEN DEFENDANTS.

Witness testified that the copy of the contract dated in October, 1926, and set up in defendants' answer is the contract between the defendants and was in force at the time witness was testifying; that there had been no extension of it but one would soon be necessary; that the company had paid the city upon it *a* $100.00 a month, amounting to $5,600.00. [104—15]

PLAINTIFF'S EXHIBIT 6 FOR IDENTIFICATION.

The witness was shown what in the first trial of this case, above referred to, had been Plaintiff's Exhibit 10, which was here marked 6 for identification. (Tr. 32.)

The witness testified that the exhibit contained seven sheets which are numbered up to a total of nine; that there is number two, two A, and number three, and then the numbering continued 4, 5, 6, etc.;

(Testimony of W. H. Muirhead.)

that on number three the spillways which he had referred to at the canal were shown but not designated as spillways. He testified that there were three and they were all shown on sheet number three; that on the top of the page appears "intake gates and the present canal." At the left upper corner on the upper part of the map it shows "overflow control gates"; just about the center of the page at the top of the page. That the spillway is shown to have an elevation of 1069.75 with a notation that they are to be raised to 1,073.75. These are water surface elevations. That is, that the water would have to exceed that surface elevation before it would fall over the spillway.

The witness made the following designations:

The entrances to the canal by the letter "E," the control gate at the entrance to the canal "D," the overflow control gates "F" and the spillway adjacent to the flume going into the power-house "G"; that the overflow elevation of "G" is not shown but it would have to be less than that of "F" because of the fall required in the canal; that a water surface elevation of 1068.87 at the [105—16] headgates would be 1067.75 at the power-house. This is indicated on the exhibit but that Engineer Allen could testify more accurately. He testified that the water from their diversion passes through the canal instead of the through the river channel. The witness

(Testimony of J. C. Thompson.)

was referring to Plaintiff's Exhibit 6 for Identification.

Mr. Muirhead was asked to look at the page that had been marked "3" in blue pencil at the left-hand top of the page, and state whether that correctly shows the present blasting or whether there had been any changes, and also whether there had been any difference in the profile readings at the foot of that page, it being called the so-called page 3 of the exhibit, but the Court interrupted to say it was page 2 and the witness answered that there were two pages "3," so that counsel removed from the exhibit, or scratched off, the figure "3."

The Court said to take off the "3" and mark it "Page 2," which was accordingly done. The witness was then asked with reference to this page 2, whether there had been any engineering done to show any different findings with reference to the elevations than those shown in the heavy line at the foot of the profile on that page. The witness answered not to his knowledge except that that is a plan of the original construction not now being utilized; that this profile is a profile of the bed of the river but that they are not now following the lines of that profile.

The witness testified that the heavy line there shown indicates the height of the rock at the bottom of the river as found by actual survey and at the

(Testimony of W. H. Muirhead.)

place where the first sheet shows the same; that this is a cross-section of the river at the point indicated by the long blue solid line on sheet 1 of this series of maps. (Tr. 36.) [106—17]

The Court admitted in evidence pages 2 and 3 of Plaintiff's Exhibit 6 for Identification, stating that the pages were so marked 2 and 3 at the lower right-hand corner; they were admitted for the purpose of illustrating the testimony theretofore introduced. (Tr. 40.)

Mr. Muirhead stated that the average head for pressure at their proposed electric plant would be 21 feet.

Asked at what surface water elevation that would be at the gates at the entrance of the canal he stated that he was not personally versed in the matter, but the information was shown on the exhibit at several different stages of the river; that the exhibit shows the effective head at three different stages of the river (Tr. 41), but that he was not a hydro-electrical engineer and would prefer not to testify and discuss it.

TESTIMONY OF HARRY OLSEN, FOR PLAINTIFF.

HARRY OLSEN, a witness for the plaintiff, testified on direct examination by Mr. REAMES: (Tr. 43.)

That he was 39 years old; resided at Medford, Oregon; was a civil hydraulic engineer for plaintiff;

(Testimony of Harry Olsen.)

a graduate of Stanford University in civil engineering with 15 years of experience. His qualifications were then admitted as an engineer. [107—18]

He said that he came into the employ of the company in 1923. He identified Plaintiff's Exhibit 2, a map prepared under his direction of the property in controversy, showing the thread of Rogue River located by measurements of the stream taken from within the banks of the stream; that the shore line as shown on the exhibit was obtained from field surveys platted during September, 1928, and the thread of the stream was located with respect to its banks at that time; that the area in the dotted line on Lot 1 on the exhibit indicates an area that defendant City of Gold Hill had sought to condemn in a suit between the parties to this suit in 1926; that the red line running down through the stream as shown upon the exhibit indicates the thread.

On examination by defendants' counsel, Mr. Kollock, he stated that the property inclosed in the dotted line was taken from the pleadings of the City of Gold Hill in that case; that since that he compared that description with the description in the city's complaint in the condemnation case and found it correct. The yellow area on the exhibit he stated indicates the blasted area as taken from the testimony of Mr. Allen, defendant Cement Company's engineer, as given in the former trial of this case before His Honor Judge Bean. He stated that in the description thus given by Allen there was ap-

Circuit Court, Josephine Co.
Ex. 9

FILED

PLAINTIFF'S EXHIBIT NO. 9

135

BOX LOT 8

BOX LOT 1

BOX LOT 7

BOX LOT 2

ROGUE RIVER

Slough

Slough

Irrigation Ditch

T36S.R3W WM

Note: Property excluded from ... the property described in paragraph III of Answer, as property which defendant City sought to condemn in its Complaint, Exhibit "B" to City's Answer, titled herein, any of which is the thread of the stream

Water surface during low flow with complete drawdown

Surveyed by C.E. Reynolds
County Surveyor
Sept. 18, 19, 21, 22, 1958

FOR DETAIL MAP SEE ...
RECORDED IN ...
GRANTS PORTLAND CEMENT
WITH REFERENCE TO BOX LOT ...
SEC. 18, T36S, R3W W.M.

THE OREGONIAN GROUP, PORTLAND

DRAWN BY L.P.C. | CHECKED BY
TRACED BY | APPROVED BY
DATE | SCALE

E-4810

(Testimony of Harry Olsen.)

The witness testified that he prepared Plaintiff's Exhibit 9 for Identification to show the effect on the thread of the stream if the diversion thereof should be complete, and that this was Plaintiff's Exhibit 9; that it is the same as Plaintiff's Exhibit 2, with this difference: That the water surface as shown on Exhibit 9 is during low flow with the complete diversion into the canal.

The witness testified that assuming that the canal is so lowered and widened (according to former testimony), and the [111—22] diversion complete, that Exhibit 9 for Identification correctly shows the thread of the stream as it would then be; that Exhibit 9 shows the then condition of the south portion of plaintiff's Lot 1 and the condition of plaintiff's Lot 2 with reference to the river under such conditions. It shows no water passing over the reef, C–C, and shows the thread of the stream moved over all the way from 60 to possibly 150 feet; 60 feet on the upper end and 150 on the lower end.

He testified that he understood the operation of the electric plant to be installed as described by witness Muirhead; that the operation of such a plant would be governed by the power requirements at the cement mill, and that as these power requirements increased more water would be required; that as they decreased less water would be required, with the resultant effect that at times there would be no water going over the reef designated on the line C–C, but at other times there might be a slight amount of flow over on the east side of the river.

(Testimony of Harry Olsen.)

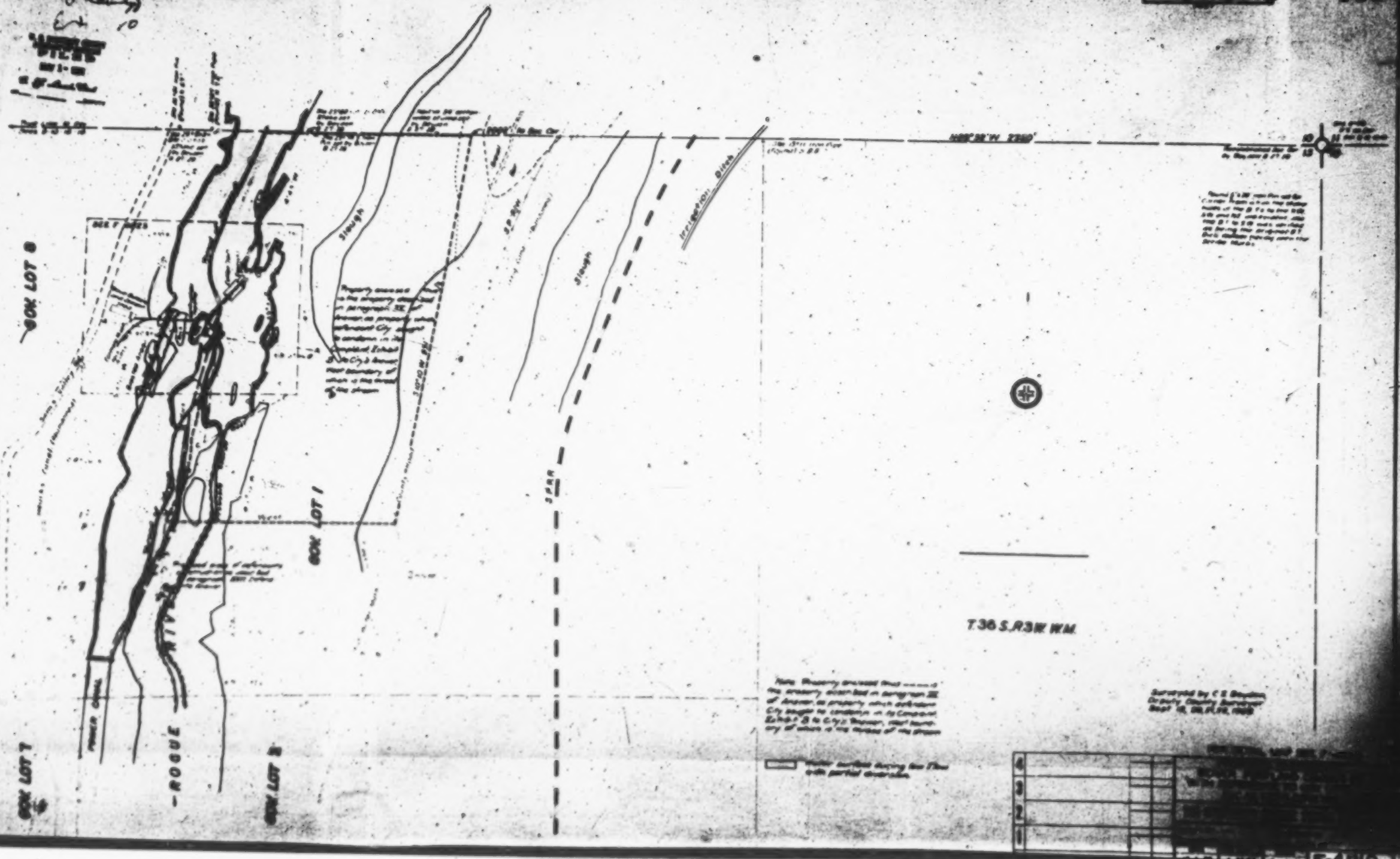
But this particular map (Plaintiff's Exhibit 9 for Identification) shows the conditions under the circumstances when all of the water would be diverted and no water would be flowing on the east side of the river.

Plaintiff's Exhibit 9 for Identification was then received as Plaintiff's Exhibit 9. (Tr. 52.)

PLAINTIFF'S EXHIBIT 10 FOR IDENTIFICATION.

Case #1616
Plaintiff
Exh. 10

PLAINTIFF'S EXHIBIT NO. 135



(Testimony of Harry Olsen.)

The witness then testified that he had then prepared Plaintiff's Exhibit 10 for Identification, which was a map illustrating conditions when the diversion should be only partial. The map indicated that there would be a small amount [112—23] flowing down the east side designated on the exhibit "probable course." He stated the use of the word "probable" was due to the fact that it was practically impossible to exactly show just where that small stream would flow due to the irregularity of the bottom of the river, as it now exists, similar to the reef. It would have a tendency to move the thread westerly from twenty to forty or sixty feet, and in some places scarcely any distance; but dependent, as said before, upon the river bottom; but there would be a tendency to move, and that would be always in a westerly direction, and there would be undoubtedly portion of Government Lots 1 and 2 entirely dry with no water on them, and possibly in some places little pools of stagnant water would be left.

That Exhibit 9 showed a complete diversion with a water surface elevation at the headgates of the canal of 1068 with about 75 second-feet of water. (Counsel for parties are agreed that witness undoubtedly meant 750 second-feet.)

The plaintiff's Exhibit 10 for Identification was then introduced as Plaintiff's Exhibit 10. (Tr. 53.)

The witness testified that he had prepared a drawing that would show the proportion of the water in a state of nature that belongs over on Lots 1 and 2 as compared with the other property, that

(Testimony of Harry Olsen.)

he did this with reference to line A–A on Exhibit 2. It is a cross-section map and is marked

"EXHIBIT 11 FOR IDENTIFICATION."

(Tr. 53.)

As stated this cross-section was taken from the river on this line A–A, at this point through the upper reef and across the river (referring to Plaintiff's Exhibit 2).

With reference to this Plaintiff's Exhibit 2 he said this cross-section (Exhibit 11) was taken across the river at the line A–A as shown on Exhibit 2, and this was taken October [113—24] 11th, 1930, showing approximately the thread of the stream at that point, the amount of water which is on each side; that on the westerly side on Lot 8 there was approximately 340–347 cubic-feet that went through the opening into the reef. This opening the witness then marked.

The witness stated that on October 11th, 1930, the total amount of water passing through openings H and I as so shown on Exhibit 11 amounted to 347 cubic-feet per second. The rest of the flow at that time was 446 cubic-feet per second; that this roughly divides up into the ratio of one to one, that is fifty—one-half to flow is on the east side, and one-half on the west side. This would be entirely across the section designated as A–A.

That going down from the north line of Lot 1 south, down the river for a distance of 500 feet approximately, one-half of the river would, in a state of nature, be on plaintiff's Lot 1 on the west side of the thread of the stream, and from that

(Testimony of Harry Olsen.)

point on down for the next 500 feet approximately two-thirds of the stream would be on the west side and one-third on the east side; that for the next 500 feet down the stream the water would be approximately one-half on either side. The witness was then using Exhibit 11.

He stated that he also showed the blasted area and also twenty-seven feet as set up in the answer of the defendants as the amount of rock which was to be removed; that in the upper left-hand portion of Exhibit 11 is shown a cross-section of the concrete dam which if placed in the river at this point would require an additional amount of concrete to replace the rock which would have been taken out of the blasted [114—25] area. That is to say—if the plaintiff should cross the river with a dam at that section, or at that place, and it would have to replace the removed rock with concrete, the exhibit shows the amount of concrete necessary for such replacement; that it does not show figures but that the amount of concrete so necessary would be roughly 100 cubic yards, and would cost per cubic yard to replace it, $25.00.

Upon objection by the defendants' counsel the Court excluded the testimony for the present until a proper foundation had been made; that then plaintiff could introduce the exhibit without recalling the witness if the evidence is competent. (No more evidence offered.) The plaintiff then introduced in evidence

PLAINTIFF'S EXHIBIT 11. (Tr. 56.)

with the exception of concrete replacement.

PLAINTIFF'S EXHIBIT 12 FOR IDENTIFICATION. (Tr. 56.)

U.S. DISTRICT COURT
DISTRICT OF OREGON
FILED

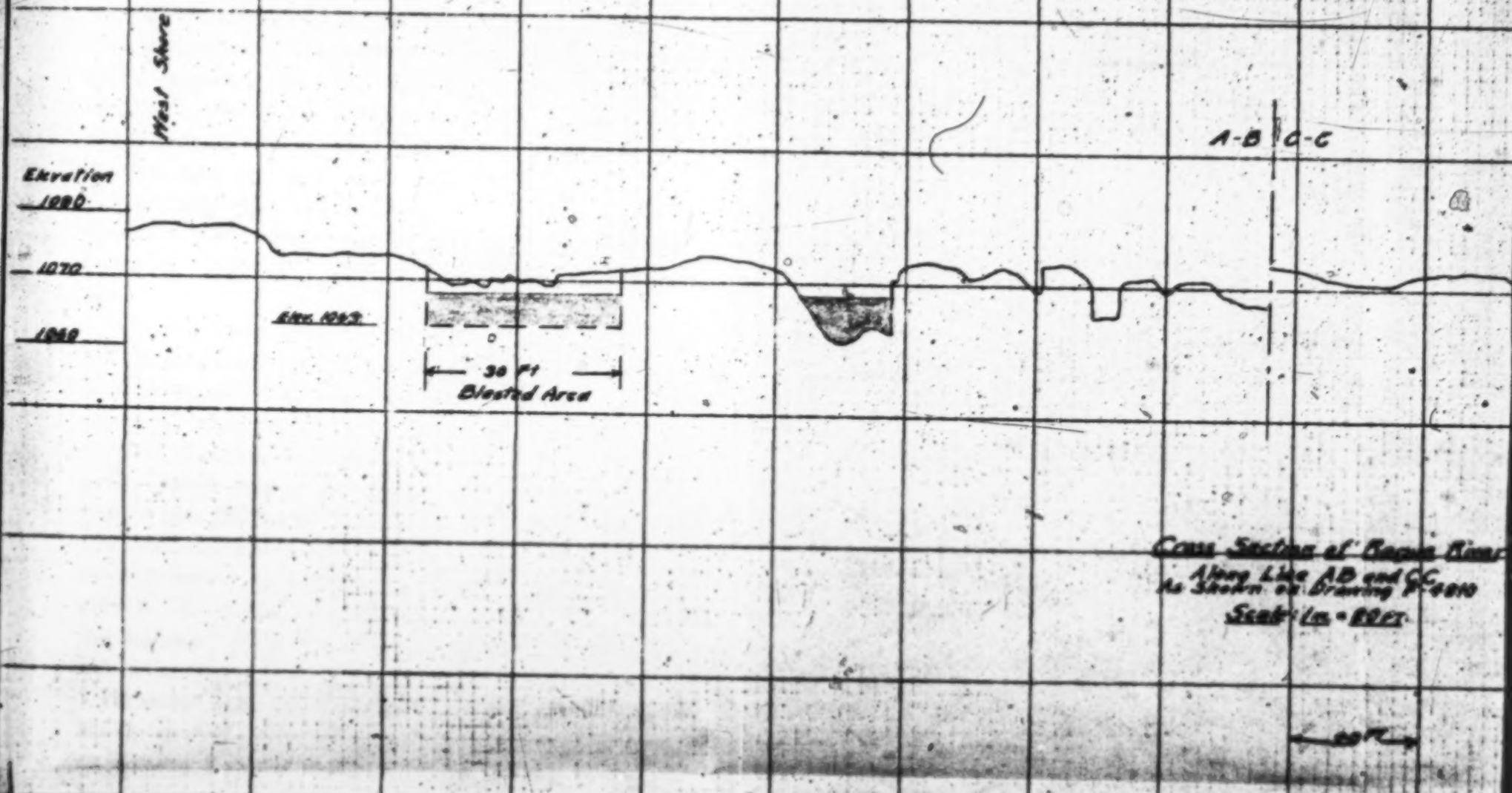
MAY 1 - 1931

G. H. Marsh, Clerk

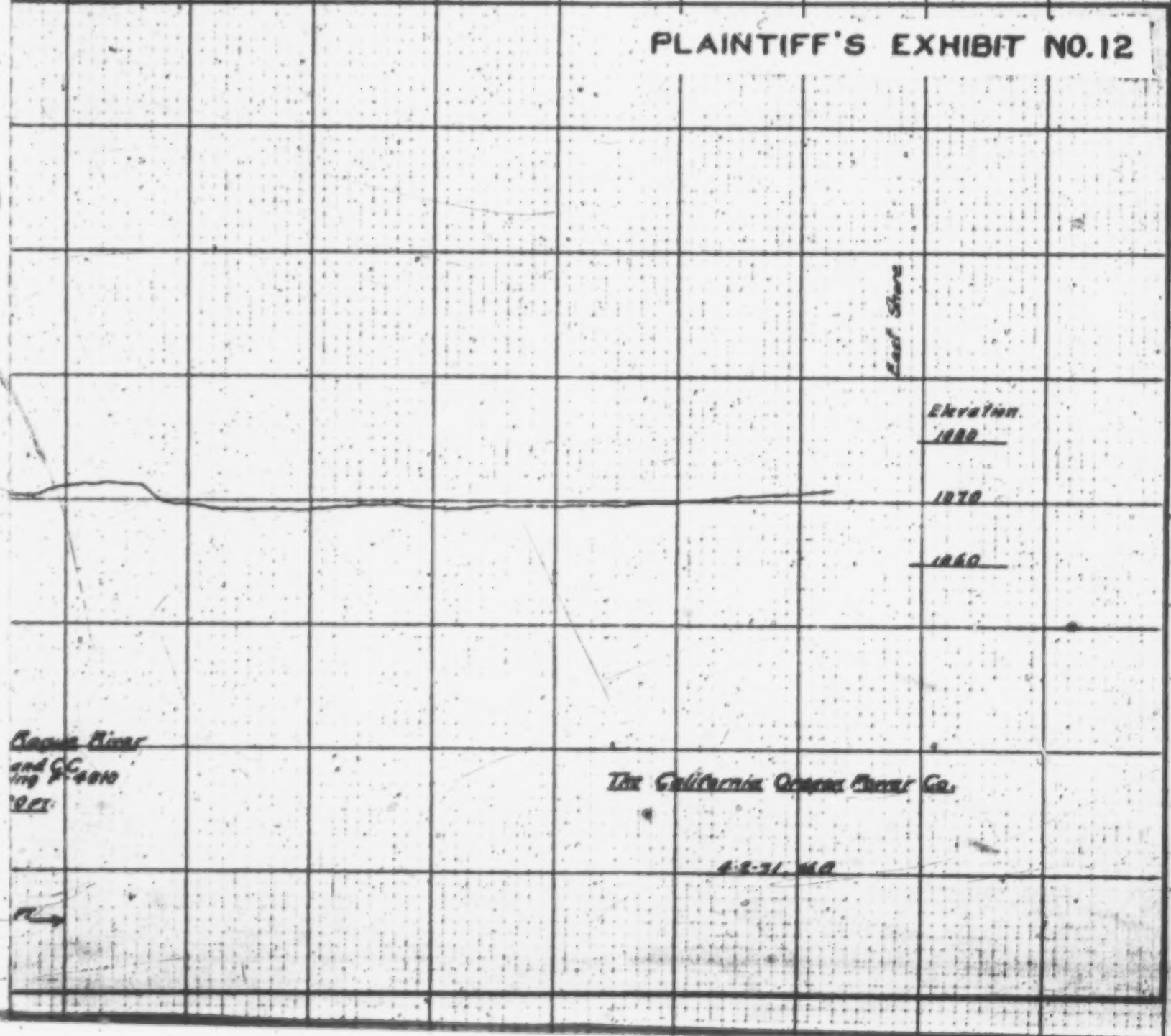
BY _____ DEPUTY

6126 4/23/31

Plaintiff's Exhibit 12



PLAINTIFF'S EXHIBIT NO. 12



(Testimony of Harry Olsen.)

The witness testified that he had prepared a cross-section showing the blasted area and the effect of removing the same. It was identified as Plaintiff's Exhibit 12 for Identification and the witness stated that this cross-section was taken from along A–B and then down, jumping to C–C. In other words—this course A–B is the reef upstream and on the west side of the river, and C–C is the reef on the east side of the river. The exhibit shows in detail what would happen if the water were drawn down to the elevation 1068 at the headgates. Then all of the water would be on the west side of the river due to the fact that the rock—the lowest point of rock on the east side—the easterly side of the reef, is about elevation 1068. The exhibits was received in evidence as [115—26] Plaintiff's Exhibit 12 (Tr. 56).

Witness Olsen was then shown Plaintiff's Exhibit 6, and shown the page marked "2" which had been referred to by Mr. Muirhead of the cement company, when the latter was on the stand, and the witness' attenion was called to that part of this profile which was at the bottom of the page, Station 19 plus 69.25 and 21 plus 17. He testified that this Station 19 plus 69.25 and 21 plus 17 covers the same territory as section C–C on Plaintiff's Exhibit 2. He stated that between these two sections, the stations, there is a heavy irregular green line indicating the rock bottom of the river at that point.

He stated that the elevations there shown by this heavy line over that section of the river indicated on Exhibit 2 as the reef at C–C, varied due to the

(Testimony of Harry Olsen.)

irregularities of the reef along the river bottom. He pointed out the following elevations: 72.7 (meaning 1072.7) down to a minimum of 68.3 (meaning 1068.3 etc); that the elevation shown over on the lines on the profile which show foot elevations, the elevations go down to 1069 and 1068,—would be approximately 68.3. The witness stated that the highest elevation of the river bed at this place has been marked "J," and is shown as 1073.3; that the lowest elevation shown between the stations designated has been marked "K" and is shown as 1068.3. He stated that when the water would be drawn down to a surface elevation of 1068 at the proposed headgates there would be no water flowing over this point in the reef. The Court said "in other words that is the point of your Exhibit 12." The witness answered: "Yes." [116—27]

Defendants' counsel asked if when drawn down to the surface elevation of 1068, the stream would be dry at that point, and the witness answered: "Yes."

Witness stated that plaintiff's land would be dry when the surface elevation should be drawn down to 1068 at the headgates.

He testified that the distance from the cement company's proposed electric plant to the company's cement mill is about 8,000 feet; that the line loss in current in that distance would be approximately 10%.

PLAINTIFF'S EXHIBIT 13 FOR IDENTIFICATION. (Tr. 58.)

PLAINTIFF'S EXHIBIT NO. 13
140

CALIFORNIA OREGON POWER CO

RIVER

ROGUE

STATE ENGINEER
RECEIVED

BEAVER PORTLAND CEMENT CO

(Testimony of Harry Olsen.)

Witness Olsen was shown Plaintiff's Exhibit 13 for identification and a copy of the blue-print in Plaintiff's Exhibit 1 for identification referred to in the testimony of Mr. Muirhead. Attention was called to the fact that sheet one of that exhibit was testified to by Mr. Muirhead where the latter had marked the red letter "A" at the arrow.

The witness' attention was called to the portion marked: "this area to be excavated six feet below low water or to elevation 1063.5 plus or minus."

He stated that he had drawn or platted the description of the blasted area to be removed according to the testimony given at the former trial of this case, thirty feet wide by 220 feet long; that this information was taken from the testimony of Allen, defendant Cement Company's engineer. That this area is the same as is shown in yellow [117—28] in Plaintiff's Exhibit 2 as there corrected by the witness to avoid an obvious error, mentioned above.

Mr. Olsen testified that the area to which the arrow points is the rock to be removed and is shown in the heavy lines. The other is shown in the dotted lines.

Comparing this with the testimony which Engineer Allen had given in the former trial, the witness said that the rock to be removed would have a width of fifty-five to sixty feet, instead of thirty feet, as testified to by Engineer Allen in the first trial of this cause.

The witness had reference to Plaintiff's Exhibit

(Testimony of Harry Olsen.)

4, a photograph taken of the place before the blasting; he stated it distinctly showed two rock islands in the foreground. But according to the revised drawing, it is indicated that the first island shown on the photograph would be entirely removed. This is according to the amended map of the Cement Company, filed April 8th in the office of the State Engineer. (April 8th of that year.) (Tr. 60.)

Cross-examination by Mr. KOLLOCK. (Tr. 61.)

The witness Olsen testified that Plaintiff's Exhibit 2 was intended to show approximately the natural condition of the river, prior to blasting; that the water is divided approximately one-half on the east side of the stream and half on the west side. This is at and above the line A–A, on Exhibit 2; that this would be above, at the head of the rocks; that within approximately the next five hundred feet downstream, the water changed two-thirds to the west side and one-third to the east side; that he [118—29] took the measurement five hundred feet southerly from B–C. That the increase of the flow of the river to the west side is caused by the reef along the line B–C; that it is the reef running north and south, and is a lower elevation than the reef C–C, and naturally allows more water to flow over towards the west side; that there is considerably more flowing through the narrows from east to west at the point immediately south of the line A–A, between that and C–C.

(Testimony of Harry Olsen.)

That he made that measurement October 11th, 1930; that he made the measurements which he mentioned in the former trial on the west side of the river, and then to determine the amount on the east side, he took the difference between the one at Gold Ray, as shown by the United States Geological Recording Gauge and what was flowing on the west side; also taking into consideration the amount then being diverted by the Gold Hill Irrigation District, that is, the 440 cubic-feet per second flow on October 11th, 1930; that he actually measured on October 11th, where the map shows 340 cubic-feet per second; that he made the measurement with a current meter, and subtracted that figure from the figure shown by the Government gauge at Gold Ray, a distance of about four miles up-stream. That he did not make any measurements of the entire flow of the stream October 11th, or at any other time, above the proposed point of diversion. The only measurement on October 11th was on the west side of the river. Any other measurements are the result of deductions from the flow of the river as measured by the Government at Gold Ray.

He stated that the cofferdam shown on the exhibit is no longer in the river; it had been removed probably a year. He indicated the concrete pier as being shown in blue. [119—30]

He testified he never measured the flow of the channel that leads to the west below the line A–B to determine the flow there that he has measured the flow of what is known as the narrows between

(Testimony of Harry Olsen.)

these two, and made the measurement October 11th. He said the total flow between those points was 347 feet. At that time the flow over the blasted area was approximately three second-feet; so the flow at that time through the narrows could be placed at 344 second-feet. That he made no approximation as to the amount coming in from the west to the east side at that point.

He stated he believed the defendants contemplated closing the entire channel that flows from the east to the west. He stated that he had platted the blasted area as a tract approximately 44 feet in width. The depth of the shattered area he had indicated in the lower part of the red area as eight feet below. It is indicated as an elevation of 1062. He said the exhibit indicated a point seven feet below the lowest point of the stream.

The witness testified that the showing on the exhibit as to the depth of the drilled holes was taken from the answer of the defendants; that holes were drilled to a depth of eight feet. So that he just took the average elevation of the rock at that point and showed it at eight feet below that. He testified that he measured some of the drilled holes personally. One particularly that he made a note of was seven feet deep and at that time the top of the hole was about six inches abo*t* the water. That he actually obtained a depth of seven feet in the rock; that the depth of the drilled holes is really based upon the defendants' answer. That the 44 feet is a maximum width that he found at one

(Testimony of Harry Olsen.)

particular point; he [120—31] does not know whether there were any other points equal to that. The measuremnt was made on the one point. That the tendency of the work done and proposed to be done by the Power Company (meaning Cement Company) in the development of their power would have a tendency to carry the entire stream or current of water, the body of the water, from the east side to the west side of the river. That the tendency would be to push the current over; that it would take all of the water under the condition if the defendants maintained an elevation of 1068 at its headgates. He stated that his idea that the east side of the river would be made dry is based entirely upon the proposition that the elevation would be reduced to 1068 at the headgates. Asked how he arrived at that figure he said:

"Knowing that the controlling factor on drying up the east side of the river, is that reef C–C, the lowest part of which is 68 feet, (meaning an elevation of 1068) if the water is dropped below that, wouldn't any water go over; the lowest point of the reef is 1068." He took this from sheet 2 of Plaintiff's Exhibit 6, the profile. (Tr., page 68.)

He stated that his estimate of 1068 at the headgates and the conclusion drawn that a reduction at that point would dry the river down below the reef, is based on the diagram or profile made in 1926. (This is defendant Cement's Company's profile, heretofore testified to.)

He admitted that since 1926, to wit: In 1927, there was unusually high water in the river, but

(Testimony of Harry Olsen.)

denied any knowledge that it carried away any rocks at the point in question or where the blasting was done. He denied any knowledge that the third island existed as shown on the original maps has not been there since the winter of 1927. [121—32]

That he did not know whether the defendants' said profile correctly showed a cross-section of the river at C–C, but he presumed that it did. That his testimony was based on the assumption that this profile correctly showed the cross-section at that point. (Tr. 69.)

He testified he did not know that the old crib had been washed out in 1927; that he had never seen the crib.

He testified the condition shown on Plaintiff's Exhibit 9 could only happen under his theory if the elevation of the headgates were reduced to 1068. He testified that the elevation at the point of diversion would be slightly higher than 1068 if the surface elevation were reduced to 1068, and would be the difference in the drop or fall, a small fall to take care of the flow of the stream; that the defendants have done nothing more than blasting towards their construction so fars as the witness knows. That they had not lowered the headgates but that he had not been down to the canal.

He testified that the controlling factor as to the amount of water which would be drawn from the upper part of the stream and diverted from the east side would be the amount of power required by the Cement Company at the cement mill.

(Testimony of Harry Olsen.)

That as far as the physical construction is concerned the only thing necessary now to be done to draw off the entire flow, would be to remove the rock in the blasted area, and deepen the canal; that the canal would have to be deepened from three to four feet. His testimony is based upon his studies showing that it would have to be lowered three to four feet; that there would have to be some widening in line with the cross-section shown in Plaintiff's Exhibit 6, sheet 4, which [122—33] would be the same as Sheet 4 of Plaintiff's Exhibit 7.

That the increase in the cross-section of the canal would vary; that the canal at present, that is, the old canal, varies in cross-sections—and,—here he was interrupted and asked with reference to a point just below the headgates at the opening of the canal, and stated:

There would have to be a lowering of the bottom of the canal three feet, 3 to 4 feet, and providing a bottom width of, say 65 feet, that is 60 to 65 feet, and side slopes one and a half to one. That this is quite an increase over the present width of the canal at that point, although he did not know the present width.

As to Exhibit 10 he said this was supposed to indicate a partial diversion; that it would be difficult to state how much water would be flowing through the probable course of the canal on the stream, as indicated on the exhibit. The exhibit indicates no definite amount of water. That the exhibit is made to illustrate the thread of the stream

(Testimony of Harry Olsen.)

regardless of the quantity of water flowing in the stream, and based upon an elevation of 1069 at the headgates. That no one could make a calculation of the amount of water flowing over the irregular reef at 1069; that it has a very irregular surface, and he did not make any calculation; that he did not think an engineer could make a very accurate determination of the flow over the reef at a stage of 1069 and 1069.4 but only an approximation.

That he had attempted to approximate it, but it would vary from 50 to a hundred second-feet; that the range would be greater than that, ranging from thirty to one hundred second-feet; the examination was all with reference to Plaintiff's Exhibit 10.

That the red line indicates where in the witness' opinion the thread of the stream would be, were any water flowing [123—34] over the natural barrier there, that is, with a relative small amount of water. That his definition of the thread of the stream is a line which is equidistant from all points on opposite shores at right angles to the thread of the stream at low water. That it is based entirely on the surface of the water as it comes in contact with the land at low water, and does not take into account the volume of water at any particular point.

That if from fifty to one hundred second-feet of water was flowing evenly over the entire width of the reef, that then the thread of the stream would be moved westerly instead of as shown on the ex-

(Testimony of Harry Olsen.)

hibit. That if the flow were uniform over the reef, conditions would be as shown in Exhibit 2, without change.

That the blasting and shattering of the rock has not now made any perceptible change in the thread of the stream; that is, not materially; that no change in the surface had resulted nor had there been any increase of flow to the west bank of the river. It might be that by reason of the shattering of the rock and a more or less filling of the channel, more water might have been forced to the east side; that it was not his conclusion as an engineer, taking into account everything that has been done, such as shattering of the rock, and leaving it where it fell, more water is flowing down the east side than down the west side at the present time; at least, not all the way through, it probably comes back and around again—back through the east and west channel. But that as far as north of this island is concerned, probably more water is going to the east than to the west at the present time.

That the fact that the defendants had filled up the channel a little more might probably put a little more water to the other side, and if you removed more of the shattered area, it [124—35] might probably come back and better the condition. For the same reason if you put in now something to obstruct it, if you took out more than before, the tendency would be more water to come through down the west side. The additional water could not be carried unless the defendants increased their

(Testimony of Harry Olsen.)

channel. That the controlling factor of injury to the plaintiff would be in the lowering of the canal and increasing the carrying capacity of that canal. That what has been done and what will be done in the removal of the rock will just make a little more flow down through the canal, and would come back because the opening is a little wider.

The witness testified that he took a reading of the record chart located as Gold Ray over a period which would allow the water to get down to the point in question, and that the flow was very even at the time he took the 440 cubic feet per second measurement. That he did not take the average reading for the day; that there is considerable fluctuation at the Gold Ray station; that he took the measurement at a time sufficient to allow the water to get down to the point in question.

TESTIMONY OF J. C. THOMPSON, FOR PLAINTIFF.

J. C. THOMPSON, plaintiff's witness.

Examined by Mr. REAMES. (Tr. 80.)

Testified that he is 46 years of age; has been Division Manager of the plaintiff for about four years.

The plaintiff sought to prove that C. W. Martin, in charge of the Cement Company's blasting operations on July 22d, 1930, had stated to plaintiff's witness, J. C. Boyle, in the presence of Mr. Thomp-

(Testimony of J. C. Thompson.)

son, [125—36] that they (defendants) intended to continue the blasting and take all of the water.

Thereupon the following occurred:

Q. (By Mr. REAMES.) What was said, if anything, with reference to the intention of the defendant Cement Company, with reference to the blasting?

Mr. KOLLOCK.—I object to that as incompetent, irrelevant and immaterial. There is no competent testimony here to show that Martin was authorized to speak for the company, a corporation, as to its intention. Mr. Thompson was not there while the operations were being carried on; he came the next day and saw Martin; Mr. Martin is an employee of the company, but I submit there is no evidence to show he was empowered to testify as to the intention of the corporation; he is not an officer of the corporation; a mere employee; not in charge of the work. Mr. Muirhead was there himself. He is the one that can speak for the company's intention.

Mr. REAMES.—May I suggest that this witness testified Mr. Martin was the one in charge.

Mr. KOLLOCK.—On the day he got there, the day after the explosion.

COURT.—In charge, but I don't think a man in charge of the work—he might be a foreman.

Mr. KOLLOCK.—That is what he was.

Q. Was there any conversation in which Mr. Martin said what the intended to do in this blasting? A. Yes, sir.

(Testimony of J. C. Thompson.)

Mr. KOLLOCK.—Same objection to that, your Honor.

Mr. REAMES.—I want to find out what he said he was going to do; he was in charge of the work, and I want to know whether he said anything as to what he was going to do.

Mr. KOLLOCK.—Was going to do what the company told him to do, I take it.

COURT.—I think I will have to sustain the objection, unless this man is shown to be an officer or someone who this Court will rule [126—36-a] is in power to speak for the company as to its intention.

Q. What was his position with the company, Mr. Thompson?

A. He is the superintendent of the cement plant, and the man with whom I do my business in relation to the delivery of power.

Mr. REAMES.—I don't know to what extent the testimony that has been introduced is considered in evidence—the testimony taken before. That same testimony was given by Mr. Boyle, who was the other party to that conversation, and whether it is in evidence or not makes quite a little bit of difference with me, as to whether I should follow this.

COURT.—The Court admitted it for all purposes without objection, so I presume it is in evidence.

Mr. KOLLOCK.—I don't think that would be competent testimony. I would submit further, in

(Testimony of J. C. Thompson.)

the matter of intention, it is the intention of the officers. Mr. Muirhead, the vice-president of the company, has been made a witness for the plaintiff, and has testified definitely what the intention was, lowering the canal, and carrying the water. No question about what the intention was, and in their own direct examination they have brought that out.

COURT.—Was this testimony objected to before?

Mr. KOLLOCK.—I don't think it was. I think we didn't consider it—

Mr. REAMES.—Moreover, Mr. Martin sat in the courtroom and was not called to dispute it.

COURT.—The evidence, so far as it is in the record is evidence, as the Court permitted the document for all purposes; if it is in there, the Court will consider the testimony for whatever weight the Court may give it. But the Court is not going to make a rule at this time that an employee of the company can speak for it. [127—36-b]

Mr. REAMES.—I am offering to show—may I state what I am going to show—I am offering to show the conversation that was testified to by Mr. J. C. Boyle at the former trial; so that will identify what I propose to do. I say in this connection that this man was in charge of this work, and told these two gentlemen what he proposed to do with reference to taking water on that side of the river; he told them what he was doing and going to do.

(Testimony of J. C. Thompson.)

COURT.—You can take it over the ruling, if you wish. If it is not sufficiently in the record, you can take it over the ruling.

Mr. REAMES.—I would not care to do that. I am just saying that I am offering to prove simply the same as shown in the testimony of Mr. Boyle, but that would also exclude the testimony of Mr. Boyle, on the same ground. I would not care to take the time of the Court on that. I had thought that since he was the man in charge of the work he was qualified to say what he was doing.

Mr. KOLLOCK.—The work had all been terminated the day before the interview.

Mr. REAMES.—Only begun; the dynamite had been exploded but this area was to be removed for the purpose of taking the water of the river on that side.

COURT.—There is testimony to that effect in the record now, as I understand the record. It would be simply cumulative.

Mr. REAMES.—Mr. Muirhead testified he intended to remove that.

COURT.—And as I understood, to take the water.

Mr. REAMES.—Not all the water; he said all they could take economically, to the extent of their permits.

COURT.—Went very carefully into how much could do. [128—36-c]

Mr. REAMES.—Mr. Muirhead says he said they are going to take all the water up to the extent of

(Testimony of J. C. Thompson.)

the permits that they can get in that way, and if that is an admitted fact in the case—

COURT.—He has testified to that. I understood he testified to that this morning. The Court on this showing will have to sustain the objection now, but as far as the record is concerned, I think it already shows it."

The witness testified that the property in controversy had a value in excess of $30,000.00; that the plaintiff had acquired the property for the purpose of erecting thereon a hydraulic plant.

The witness testified that the property was located just above the Pacific Highway between Grants Pass and Medford, and had unusual value as a stand-by plant. Explaining the meaning of the term "stand by plant" he said that such utilities, where their plants were removed from the center of distribution, usually maintain steam plants near the center of distribution, but that this plant would serve the same purpose that a steam plant would serve. It would be located near the center of distribution there, 12 miles from Medford, and equidistant from Grants Pass, and enable the Company to give stand-by service at Medford and Grants Pass, and at the Cement Company's plant at its quarry and the Illinois Valley. That the company was then building into the Illinois Valley.

He explained that the plaintiff's closest plant of [129—37] any size was at Prospect, approximately forty miles from the site in controversy, and back in the mountains on the upper Rogue River; that

(Testimony of J. C. Thompson.)

there were also plants in California, the Copco plant on an air line being about one hundred fifty miles from the site in controversy; that the transmission line comes into Medford over mountainous territory over the Siskiyou mountains. That the line is located in a territory subject to heavy snowfall, and subject to interruptions by the falling of trees on the line, so that a stand-by plant, such as is described, is partly used for protection against interruption in the service. Besides that, this plant would generate quite a little bit of power, estimated in 1926 to be about 5500 horse-power.

Asked what the plaintiff had done since it acquired this property on the 11th day of March, 1921, in the way of installation of power to carry out its obligations in the territory supplied by the utility, he answered:

That in 1922 it put in a second unit at Copco Number 1 of 18,000 horse-power, cost roughly $600,000.00; in 1923 and 1924 it put in the east side Klamath Falls plant of 4,200 kilowatts, cost approximately $600,000.00; in 1925 it put in Copco Number 2 with 44,000 horse-power at a cost of three million dollars. In 1926 and 1927 it finished the plant of 44,000 horse-power, estimated to cost three and one half million dollars; that in July, 1926, defendant city offered for sale its hydro-electric plant and plaintiff sought to purchase it, and submitted an offer of $40,000.00 for the plant. The defendant cement company offered $22,600.00 with practically the same conditions, except that

(Testimony of J. C. Thompson.)

the plaintiff's [130—38] was for cash, and the Cement Company's for one hundred dollars a month. That the propositions were submitted to an election resulting favorably to the Cement Company.

At this point the plaintiff offered to prove its ability and willingness to build a plant, if given an opportunity to, but the Court held that this was anticipating, and for the present sustained the objection.

The witness testified that the Public Utility Commission fixed plaintiff's rates as such public utility in the territory served, and the company filed its rules and regulations with the commission. These were produced and marked

PLAINTIFF'S EXHIBIT 14 FOR IDENTIFICATION,

being duly certified to, and offered in evidence, they were admitted by the Court. (Tr. 89.)

Plaintiff's Exhibit 14 is a certified copy of the Oregon Public Service Commission's Rules and Regulations, with the rates fixed by such commission to govern plaintiff's charges for electrical current to be furnished by it as a public utility operating in Jackson County, Oregon, and elsewhere.

The witness testified that the plaintiff had since the establishment of these rates complied with the requirements of the commission, and that the prop-

(Testimony of J. C. Thompson.)

erty in question is necessary as a part of the company's property for its compliance with these public requirements. The property is very necessary and very desirable.

The witness testified that the amount of power consumed by the City of Gold Hill is less than 170 horse-power within the city limits. This is the maximum demand. He testified that a kilowatt is three-quarters of a horse-power. [131—39]

THE DECREE OF MAY 3d, 1911. (Cause No. 3098.)

This was Plaintiff's Exhibit Number 7 in the first trial.

Plaintiff also offered in evidence the certified copy of the decree of December 20th, 1929, between these parties, cause Number E.-8991, being a final decree, rendered in accordance with the mandate of the Circuit Court of Appeals. The two exhibits were admitted, the decree of May 3d, 1911, as Exhibit Number 15.

PLAINTIFF'S EXHIBIT No. 15.

In the Circuit Court of the United States for the District of Oregon.

BE IT REMEMBERED, That on Wednesday, the 3d day of May, 1911, the same being the 21st judicial day of the regular April Term of said court, the following proceedings, among others, were had before the Honorable ROBERT S. BEAN, United States Distict Judge for said District, to wit:

[Endorsed]: U. S. District Court, District of Oregon. Filed Oct. 14, 1930. G. H. Marsh, Clerk.

U. S. District Court, District of Oregon. Filed May 1, 1931. G. H. Marsh, Clerk.

Plaintiff's Ex. 15. E.–9126. 4/23/31.

No. 6874. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jun. 18, 1932. Paul P. O'Brien, Clerk

In the Circuit Court of the United States for the District of Oregon.

No. 3098.

SUIT FOR AN INJUNCTION AND OTHER RELIEF.

CONDOR WATER & POWER COMPANY, a Corporation,

Plaintiff,

vs.

GOLD HILL CANAL COMPANY, a Corporation, and OREGON WATER & POWER COMPANY, a Corporation, Defendants.

DECREE.

This cause came on to be heard on the 9th day of February, 1911, at this term, argued by counsel and taken under advisement; and thereupon and upon consideration thereof, it is ordered, adjudged and decreed as follows, viz.:

That the plaintiff is the owner and entitled to pos-

session of the following described lands situate in the County of Jackson, State of Oregon, to-wit:

Lots one and two in Section Fifteen Twonship Thirty-six south of Range Three West of the Willamette Meridian, which lands are lying and situated along the bank of Rogue River; that said Rogue River is a non-navigable stream and that the plaintiff's ownership of said lands extends under the waters of said river and includes the bed thereof lying in front of said Lots one and two to the middle of said channel or the thread of the current of said stream; that the Gold Hill Canal Company, a corporation, in the year 1906 and before the filing of the complaint herein in the Circuit Court of the State of Oregon for Jackson County, began constructing a dam across Rogue River and on the lands of the plaintiff; that the defendants or either of them had no right or privilege to construct said dam upon the lands of *of* the plaintiff, said lots one and two except the right of maintaining a dam in and across Rogue River opposite said lots one and two from a point on the bank of said river on the land occupied by said defendants to a point on said Rogue River where now stands a crib or crib work forming and constituting a part of a dam previously constructed in said Rogue River and constituting the end thereof on the side of the middle of said river nearest the property held or claimed by the plaintiff, and of the heighth which said cribs were originally constructed; that the Gold Hill Canal Company and its successor, Oregon Water & Power Company, and all persons claiming by, through or under either of

said corporations are hereby forever enjoined and restrained from building or maintaining on said lots one and two in said section Fifteen or the riparian lands in front of said lots one and two extending from the shore line thereof to the middle or current of said stream, any dam or other obstruction or structure except a dam that may be constructed from a point on the bank of said river on the land occupied by said defendants to a point in said Rogue River where now stands a crib or crib work forming and constituting a part of a dam previously constructed in said Rogue River and constituting the end thereof on the side of the center of said river nearest the property held or claimed by the plaintiff, and of the same heighth at which said dam was maintained or constructed.

That the preliminary injunction heretofore granted in this suit be dissolved and vacated and set aside as to any and all acts not enjoined by this decree.

It is further ordered, adjudged and decreed that neither party shall recover its costs.

Dated this 3rd day of May, 1911.

R. S. BEAN,
Judge.

O. K. except as to costs, that section to be left to his Honor Judge Bean.

GEO. H. DURHAM,
Of Solicitors for Defts.
ROBERT G. SMITH,
Attorney for Plaintiff.

Filed May 3, 1911. G. H. Marsh, Clerk.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing copy of Decree in cause No. 3098, Condor Water & Power Company vs. Gold Hill Canal Company and Oregon Water & Power Company, has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 7th day of March, 1928.

[Seal] G. H. MARSH,
Clerk.
By F. L. Buck,
Chief Deputy Clerk.

The decree of *May* 20th, 1929, as Exhibit Number 16. (Tr. 92.)

PLAINTIFF'S EXHIBIT No. 16.

In the District Court of the United States for the District of Oregon.

BE IT REMEMBERED, That on Friday, the 20th day of December, 1929, the same being the 34 judicial day of the regular November term of said court, the following proceedings, among others, were had before the Honorable ROBERT S. BEAN,

United States District Judge for said District, to wit:

[Endorsed]: U. S. District Court, District of Oregon. Filed Oct. 14, 1930. G. H. Marsh, Clerk.

U. S. District Court, District of Oregon. Filed May 1, 1931. G. H. Marsh, Clerk.

Plaintiff's Exhibit 16. E.-9126. 4/23/31.

No. 6874. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jun. 18, 1932. Paul P. O'Brien, Clerk.

In the District Court of the United States for the District of Oregon.

No. E.-8991.

THE CALIFORNIA OREGON POWER COMPANY, a Corporation,

Appellee,

vs.

CITY OF GOLD HILL, a Municipal Corporation, and BEAVER PORTLAND CEMENT COMPANY, a Corporation,

Appellants.

MODIFIED DECREE.

An appeal having been taken to the United States Circuit ~~District~~ Court of Appeals for the Ninth ~~District,~~ Circuit from the decree heretofore entered herein, and the mandate of said appellate court having issued on the 21st day of November, 1929, and having been duly

filed herein on the 25th day of November, 1929, and said mandate having directed the modification of said original decree, and the said decree, as so modified, having been affirmed, it is now

ORDERED, ADJUDGED AND DECREED as follows:

That the plaintiff, The California Oregon Power Company, a public service corporation organized and existing under and by virtue of the laws of the State of California and qualified to transact business in Oregon, is the owner and entitled to the possession of lots one (1) and two (2) in section 15, township 36 south, range three (3) west of the Willamette Meridian, Jackson County, Oregon, and which lands lie and are situated along the bank of Rogue River, which is a non-navigable stream. That plaintiff's ownership of said lands extends under the waters of said river, and includes the bed thereof lying in front of said lots, and to the middle of the channel or thread of the current of said stream. That the defendant, City of Gold Hill, Oregon, is a municipal corporation existing under and by virtue of the laws of the State of Oregon, and is the owner and in possession of lots six (6), seven (7) and eight (8) in said section 15, and which lands lie on the opposite side of said stream and border thereon. That the defendant City's ownership of said lands is subject to the terms and conditions of a certain option to purchase the same by the defendant Beaver Portland Cement Company, which is a private corporation organized and exist-

ing under and by virtue of the laws of the State of Oregon.

That heretofore, on the 3rd day of May, 1911, there was pending in this court Cause #3408 entitled "Condor Water & Power Company, a corporation, Complainant, vs. Gold Hill Canal Company, a corporation, and Oregon Water & Power Company, a corporation, defendants." That on that day a decree was duly made and entered in said cause decreeing that said Condor Water & Power Company was the owner of said lots one and two extending under the waters of said river, and including the bed thereof lying in front of said lots, to the middle of said channel or the thread of the current of the said stream. By said decree the said Gold Hill Canal Company and its successor, said Oregon Water & Power Company, and all persons claiming by, through or under either of said corporation, were forever enjoined and restrained from building or maintaining on said lots 1 and 2, or the riparian lands in front thereof to the middle of the current of said stream, any dam or other obstruction or structure, except a dam that might be constructed from a point on the bank of said river on the land occupied by said defendants in said cause to a point in said river where then stood a crib or crib work forming or constituting a part of a dam that had been previously constructed in said river, and across the thread of said stream on said lot 1. That the plaintiff herein has succeeded by mesne conveyances to all of the right, title and interest of said Condor Water & Power Company in and to all

of said lots one and two, and to all of the rights of said company under said decree.

That the defendant City of Gold Hill has succeeded to and owns all of the right, title and interest of said Gold Hill Canal Company, and said Oregon Water & Power Company, in and to said lots 6, 7 and 8.

That said dam so authorized by said decree to be built and/or maintained, across said river to the crib or crib work referred to in said decree, was never constructed, nor was any attempt ever made to build a dam at the place specified in said decree prior to the actions of the defendants herein in August, 1928, set out and alleged in the complaint. That following the rendition of said decree in 1911, the said Oregon Water & Power Company continued for some years to be the party in interest in said lots 6, 7 and 8 and in the power plant to be constructed therein and therefrom, but made no effort to construct or maintain a dam under the terms of said decree, and abandoned the right to so construct and/or maintain any dam, or any structure upon any part of said lots 1 or 2, but did not abandon and still has its easement in the site of the old crib or pier to the extent of the dimensions thereof as herein determined; and neither the defendants nor their successor in interest in the ownership of said lots 6, 7 and 8, and in the ownership of the electric plant which the defendants were reconstructing at the time of the institution of this suit, have any right, under the terms of said decree

of May 3rd, 1911, to either build, construct or maintain any structure except as herein decreed.

That at the time of the institution of this suit, the defendants were constructing on the plaintiff's side of the middle of said stream, and on lot 1, and at or about the point where the crib work mentioned in said decree of 1911 had been constructed, a cement pier from which they were building a coffer-dam, to later be filled with cement, as a part of a dam to be constructed across said river to said lot 8. That the defendants had already built on plaintiff's said land at said point cement works of a permanent nature for the purpose of diverting the waters of said stream from plaintiff's said land. That all of said construction work by the defendants upon plaintiff's side of the center of said stream and upon said lot one, was wrongful and without right, except that the defendants have the said easement on the site of said crib or pier to the extent of the size and dimensions of said crib or pier, and had and have an easement upon said lot one therefor.

That the defendants and each thereof, their agents, servants and employees, and all others in the aid or behalf of either thereof, be, and they and each of them hereby are, forever enjoined from building or maintaining any structure or diversion or obstruction works upon any part of said plaintiff's lots one and two, as the same extend under the waters of said river, and to the middle of the channel or the current of said stream, except that it may exercise said easement on the site of such old crib or pier, and to the extent of the size and dimensions thereof as herein determined.

That this injunction applies to the successors in interest of the City of Gold Hill, and of said Beaver Portland Cement Company in the ownership of said lots 6, 7 and 8, and in the ownership of the power plant of said City of Gold Hill situated upon a portion of said defendant City's said property.

That said old crib or pier herein referred to and for which defendant City has said easement is situate on the said lot 1; the most southwesterly corner of said old crib or pier bore north 88° 30′ east and distant 168 feet from a point on the west bank of Rogue River marked by a surveyor's stake and distant 400 feet south from the north quarter corner of section 15, township 36 south, range 3 west of the Willamette Meridian, and also bore north 54° 16′ east from a point on the west bank of said river 516.14 feet south from said north quarter corner; the most northwesterly point of said old crib or pier bore north 4° 30′ 47″ each from such southwesterly corner of said crib a distance of 80 feet; the width of said old crib or pier was 10 feet; and its height was 4 feet above low water.

This decree is without prejudice to such rights, if any, as either party to this suit may have under the principle of riparian rights or by appropriation. The water rights, if any of the parties to this suit, whether claimed under the riparian doctrine, or under the doctrine of appropriation, are not determined.

IT IS ORDERED, ADJUDGED and DECREED that the plaintiff have and recover from and of the defendants herein the plaintiff's costs

and disbursements hereinbefore taxed and allowed at $105.45. That the defendants recover from and of the plaintiff one-half their costs, expended upon such appeal, and taxed in said mandate at $234.63. That said judgments be, and the same hereby are, offset so that the defendants have and recover from the plaintiff the difference in said judgments for theid costs, to wit, $129.18, and that execution issue therefor.

Dated December 20, 1929.

R. S. BEAN,
Judge.

Filed December 20, 1929. G. H. Marsh, Clerk. By H. S. Kenyon, Deputy.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing copy of Modified Decree, in cause No. E.-8991, The California Oregon Power Company vs. City of Gold Hill et al., has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 24th day of December, 1929.

G. H. MARSH.

[Seal]

G. H. MARSH,
Clerk.

_____,
Chief Deputy Clerk.

(Testimony of J. C. Thompson.)

There were then introduced from the judgment-roll in E.-8991 the complaint, answer and replication to be supplanted by certified copies. The ensuing colloquy resulted in the introduction of the judgment-roll, including the opinion as

PLAINTIFF'S EXHIBIT NUMBER 17.
(Tr. 93.)

J. C. THOMPSON, cross-examination:

(Questions by Mr. NEWBURY.)

He testified that he had been employed by The California Oregon Power Company since 1920; he was employed during his first years of service as Assistant General Agent, and through subsequent promotions advanced to the position of Division Manager, which position he holds at the present time. He is quite familiar with the activities of the corporation ever since he has been connected with it, and is familiar with the fact that the plaintiff, The California Oregon Power Company, had acquired this property that is known as Lots 1 and 2, from the predecessors in interest of The California Oregon Power Company, and knew that the parties who had started in with the development of the electric light and power company out there were the Condor Water and Power Company. [132—40]

He was then asked and answered:

"Q. Now you say that this tract of land there and this place where the Beaver Portland Cement

(Testimony of J. C. Thompson.)

Company are now endeavoring to put in a plant is necessary as a stand-by plant for the California Oregon Power Company?

A. The entire development is; yes.

Q. How long a time has that been a necessity for the California Oregon Power Company?

A. Since 1920." (Tr. 95–6.)

In response to a question as to whether the plaintiff has from the time it acquired the property taken any step towards the installation of a plant there as a stand-by plant, and as to whether any work had ever been done upon the ground there to indicate that it intended to do anything of that kind, he answered, "I don't know whether you call it work or not, but preliminary engineering studies have been made of the property in 1926; that prior to that time there had been a general plan," which witness stated he "had not seen."

Mr. Reames at this point suggested that there seems to be a necessity for a correction of a statement running all through the testimony, in that the property was not acquired by the plaintiff corporation until March 11, 1921.

The witness further stated that there had been plans for the development of this property between 1921 and 1931. Asked to explain when such plan was adopted, he stated that the plan about which he knew definitely was made in 1926, and another later; that at the time the 1926 plan was made, the Beaver Portland Cement Company was proposing to enter into a contract with the City of Gold Hill

(Testimony of J. C. Thompson.)

with reference to their power development there; that because it was necessary to submit something to the head office of the company in Chicago in order to get the money—the money to put in the plant, so that they could tell the voters of Gold Hill positively that we were going to make developments.

The witness further stated that he had personally no information about preliminary plans prior to that time. [133—41]

Witness further stated that so far as his information went, the company prior to 1926 made no definite plans for the improvement of the site.

Witness stated that it was necessary to make arrangements with Chicago—that elections were about to be held, and they (the plaintiff corporation) were bidding for the property, and it was necessary to get authority to spend a certain amount of money, and before the plaintiff could get authority, it was necessary to have a budget approved, and at that time they went into more details as to the amount which it would be necessary to spend in order to put in the plant we wanted to put in; that the home office of the plaintiff corporation in Chicago, to which reference had been made, was the office of H. M. Billesby & Company in 1926; that he did not know when connections were made with H. M. Billesby & Company; that the Company made its development at Prospect in 1927 or 1928; that prior to that time there had been established at Prospect a power plant of about 5,000 horse-power

(Testimony of J. C. Thompson.)

capacity, which was increased by the new installation of 44,000 horse-power.

The witness further testified that they had a power plant known as Copo No. 1 and Copo No. 2 situated in California; Copo No. 1 having been put in previous to 1922; the second unit was put in in 1922, and Copo No. 2 was installed in 1925 and 1926. Asked as to the capacity of these different plants, the witness stated that Copo No. 1 plant was put in as an additional unit of 18,000 horse-power, making two 18,000 horse-power units, or a total of 36,000. Copo No. 2 has two 20,000 horse-power units, aggregating 40,000.

Witness further stated that the increase of capacity at Prospect and Copo No. 1 and Copo No. 2 did not very largely, or at all, do away with the necessity for a stand-by plant at Gold Hill, but rather aggravated the necessity, and stated "but as a community grows, the greater requirement for a stand-by in that community." Asked to explain this further, the witness stated "We have a transmission line that runs straight through the territory east of Medford and Grants Pass; that the Prospect feeds into that as well as the Copo plant; the plants are interconnected; the line that feeds in from Prospect and Gold Ray is the line that feeds into the Rogue River Valley from Prospect." [134—42]

The witness repeated his statement made previously that the necessity for a stand-by plant at the site in controversy had always existed.

(Testimony of J. C. Thompson.)

The witness testified that they intended to bring the Red Blanket covered by application No. 9227, South Fork of the Rogue River 9228, and the North fork of the Rogue River No. 9229 over to the Prospect plant that they had in addition application No. 9330 for 3400 horse-power at Mill Creek, and also Klamath River No. 2 for 13,607 horse-power, making a total of 171,663 horse-power covered by the above-mentioned applications, and that they also had applications covering power at the North Umpqua Clearwater site, and that at Link River there had been adjudicated under applications No. 1118 and No. 5541, 563 horse-power, and also applications numbered 1503, 3026 and 2856 at Keno, with a total of 2188 horse-power, but that the plant at Geno was at least 150 miles from Gold Hill. He also testified further in reference to the plant at Gold Hill, originally the property of the Condor Water and Power Company, adjudicated at 3,409 horse-power, that it was now being operated by the plaintiff corporation. Also being interrogated in reference to an application for Hellgate on the Rogue River, he stated that he did not believe they had any applications pending, but that they owned property sites in that vicinity acquired as sites for the development of power; that a tentative layout had been made by the company; that if carried out would be a very large development located about 15 or 20 miles below Grants Pass, perhaps somewhat less than that by the river; that the plant at Hellgate, if constructed, would be on

(Testimony of J. C. Thompson.)

the same line for which the company is needing the stand-by at Gold Hill; that the company could make a very much larger development of electricity at Hellgate that they could at the site in controversy at Gold Hill, and that if that plant was established it could be used as a stand-by as well as the proposed plant at Gold Hill.

Asked further as to the tentative plans for construction at the site in controversy at Gold Hill, the witness testified that in 1926 the company was going to build a dam across the river in the bed of the stream just above the old highway bridge, and at the point where they proposed to construct this dam was between three-quarters of a mile and a mile [135—43] down the river from the point where the Portland Cement Company and the City of Gold Hill proposed to establish their plant. The witness' attention being called to the legislative enactment of 1929 asked whether since the legislation enactment of 1929 the company still had plans for this construction, the witness stated that "they had," his understanding being that the enactment did not in any way interfere with such construction." Asked whether he knew about the enactment of the law of 1929 referred to by Mr. Newbury, prohibiting the construction of power plants in the Rogue River west of a certain point, somewhere near Prospect. He answered that he knew about it.

(Testimony of J. C. Thompson.)

J. C. THOMPSON, redirect.

(Questions by Mr. REAMES.)

Asked further in reference to the Hellgate site, the witness stated that it was approximately 15 miles from Grants Pass. He stated that in his opinion it would be, by road, approximately 35 or 40 miles; that he knew nothing about the comparative costs of the two plants; that it would operate as a stand-by for Grants Pass, but not for Medford; that it would be approximately as far from the site in controversy at Gold Hill as the Prospect plant; that the Hellgate site was located in the mountainous country below Grants Pass; that all of the numerous filings referred to on cross-examination by Mr. Newbury, were all between Keno and the Copo plant downstream from Keno. The properties known as the Canyon projects are all in Oregon below Spencer bridge. Keno plant is located below Keno that some certain legal difficulties came up in connection with the utilization of that site; and that the construction is held up on some legal question.

The witness stated that a notice of the negotiations with the home office of the company in Chicago in 1926 was sent to the Mayor and city council of the City of Gold Hill and to all of the voters of that city, stating that if the proposition made by The California Oregon Power Company was approved, the company would go ahead immediately with the construction, and a letter [136—44] signed by Paul B. McKee, Vice-President and General

(Testimony of J. C. Thompson.)

Manager of the company, marked Plaintiff's Exhibit 18, was introduced in evidence reading as follows:

PLAINTIFF'S EXHIBIT No. 18.

"THE CALIFORNIA OREGON POWER COMPANY.

Medford, Oregon, July 2, 1926.

"To the Voters of the City of Gold Hill:

"Our offer to purchase the properties of the City of Gold Hill which are useful for waterpower development will be voted on next Tuesday, July 6th. I think it is of interest to the citizens of Gold Hill to know that if our offer is accepted we will continue the engineering investigations which have been commenced, and upon completion thereof will begin construction work upon the plant.

"The cost of this plant will be in the neighborhood of three-quarters of a million dollars, and the necessary funds are available to us.

"It is our intention to complete the engineering work at the earliest possible date, and the construction of the plant will be carried on during the summer season of 1927.

"Yours very truly,

"PAUL B. McKEE,

"Vice President & General Manager."

On recross-examination, the witness stated that without the proposed stand-by plant the company had been "just getting along"; that the efficiency of the Gold Ray plant could not be increased very

(Testimony of John C. Boyle.)

greatly—probably five per cent; that it would not be possible to get an increase of approximately forty per cent; that on account of the railroad fill for the Southern Pacific track, the dam could not be elevated very materially, if at all.

TESTIMONY OF JOHN C. BOYLE, FOR PLAINTIFF.

JOHN C. BOYLE, witness for the plaintiff.

(Examined by Mr. REAMES.)

He testified that he was 43 years of age; lived in Medford; was a civil engineer; Assistant General Manager of the plaintiff; been in that line of business for twenty-one years, and with plaintiff since its organization in 1920; a graduate engineer of the University of California. His qualifications were admitted.

He first saw the shattered area as shown on Plaintiff's Exhibit 2 the day following the explosion; was with Mr. J. C. Thompson.

The Court ruled that the witness should not go into the conversation with C. W. Martin, in charge of the dynamiting. The conversation was referred to in the testimony of Mr. Thompson.

The witness heard the testimony of Mr. Muirhead, Vice-President and Treasurer of the Cement Company, and in charge of the operation of the cement plant. He stated that he heard the description given by Mr. Muirhead of the kind of plant he [137—45] intended to install for the defendant Cement Company that he was acquainted

(Testimony of John C. Boyle.)

with that type of plant. This referred to the proposed electrical plant to furnish power for the cement mill. He testified that he had to do with the operation and installation of such plants; that we (meaning plaintiff company), had five similar plants in operation on its system under his charge.

He explained that this type of electric plant operates automatically. That is, that the amount of load delivered at the end of the line, or at the motors in the cement mill, is automatically taken care of by the automatic feature of the electric plant, allowing sufficient water to run through the turbines to pick up or drop the amount of load necessary to be delivered; that by the term "load" he meant the amount of energy required to run the motors, lights and different electrical installations which are installed at the delivery end of the distribution lines.

That the amount of electricity required at the cement mill from moment to moment, or hour to hour, during the operation thereof, is determined by the number of motors and other appliances that are put in service, or taken out of service at any time of the day. That is the amount of power required at the cement mill is suddenly and greatly increased, this is supplied automatically; the electric plant would automatically pick up the amount of water required to generate the load—the energy for the load that is picked up. That in the operation of the cement mill the load would be changed by a man disconnecting or connecting his motor, or it could be changed by the different load conditions

(Testimony of John C. Boyle.)

on the motor itself. That assuming that a certain amount of electricity is being used at the cement mill and more was suddenly turned on at the cement mill, the power would be drawn from the distribution line running to the cement mill. The amount of power plus [138—46] loss in transmission, and in the line added to it, would be the amount of power which the electric plant would have to pick up. The sudden turning on of that power would automatically increase the quantity of water necessary to pick up the additional load. He explained that there is a set of gates that are operated by a governor which is electrically controlled. These gates open and close on the turbine itself, allowing the required amount of water to go through to generate the load as indicated by the delivery at the end of the distribution line. These gates are operated automatically; that if there is no load on the cement mill, there would be no water flowing through the electric plant. As the load is picked up at the electric plant, the amount of water required to produce that load is drawn from the canal and through the canal up to the full capacity of the electric plant, if the load requires it. That when the cement mill draws no current at all, the water is automatically shut off at the electric plant wheel; that the effect which this has on the water in the canal and on the water in the forebay above the canal is that the water will seek its own level, and build up to the spillway level, above the spillway level until the quantity of water flowing in the

(Testimony of John C. Boyle.)

river can discharge into the spillway, or be forced back into the channel of the river above the intake gate.

He testified that he heard the testimony given on the previous day by Mr. Muirhead, in which Mr. Muirhead pointed out upon the exhibit the elevation of two spillways in the canal. Asked if he remembered the elevation of these spillways, he answered that the elevation is shown on Plaintiff's Exhibits 6 and 7. The witness referred to page 3 of Plaintiff's Exhibit 6. The place where the overflow was marked by the letter "F" by Mr. Muirhead, which exhibit showed that the top [139—47] of the spillway was to be raised to an elevation of 1073.75. The witness testified that the contemplated elevation of the spillway on the canal is shown by the exhibit as 1073.75. That the exhibit does not show a contemplated elevation at the letter "G" on the same exhibit. That if the current should be suddenly shut off at the cement mill, and the gates at the electric plant thereby suddenly closed, then the elevation of the water at this spillway would rise to 1073.75 (the spillway just described by the witness). That this would result in the surface of the water above the intake canal—the gates to the canal—seeking the same level above 1078.75. The witness referred to Plaintiff's Exhibit 13, which is a new map filed by the Cement Company with the State Engineer, and testified that the same shows the new concrete diversion dam elevation to be 1073.0. That this is .75 of a foot

(Testimony of John C. Boyle.)

below the elevation of the spillway shown at page 3 of Plaintiff's Exhibit 6. That these are the only elevations shown on this wing-dam which would be the spillway elevation. That there could be no drawing of water in the canal below the overflow gate shown on page 3 of the exhibit; that there would be no water passing below that point when the plant is not in operation. That the flow of the water between the spillway and the plant would be stationary at the time the plant is shut down.

PLAINTIFF'S EXHIBIT No. 2.

The witness took Plaintiff's Exhibit 2 and testified that the reef shown thereon extends across the river from the west [140—48] side along the section marked "A–B" to nearly the center of the river; thence it extends southerly along the section marked "B–C," this section being near the center of the river; it then extends easterly to the east shore of the river along the section marked "C–C." That the effect of this reef has upon the division of the waters of the stream between plaintiff's lands and those of the defendants is this:

It retards the flow of the river above the reef, the water flowing more rapidly from the down stream side of it. The division of the water is approximately one-third through the reef shown as A–B, one-third from east to west over section B–C and one-third over section shown as C–C. That the reef marked "A–B" runs through the head of the shattered area. That at the time he looked

(Testimony of John C. Boyle.)

the premises over, immediately following the explosion of the dynamite, he did this with reference to the effect that this work might have upon the flow of the stream, and the division of the water between the parties hereto, if the rock shattered by the explosion should be removed from the shattered area.

His attention was called to the testimony of Mr. Muirhead, and to Mr. Muirhead's intention of having the shattered rock removed and the sides of the blasted area leveled up and smoothed, and he said that if the area described by Mr. Muirhead is excavated to completion, the effect would be that all of the water from the river could be taken to the west side and used through the proposed power canal. That it would be taken through the power plant as the load became sufficient to require that quantity of water; that the channel to be so completed, as described by [141—49] Mr. Muirhead, would have sufficient discharge area to permit the discharge of 1347 second-feet of water at a water surface elevation of 1069, 1068 or 1067, whatever surface elevation it was there desired to draw the water down to in order to produce the power required at the cement mill; this result, of course, to be contingent upon the completion of the intake gates of the canal and the excavation of the canal, as shown upon Plaintiff's Exhibits 6 and 7. That in this he was including the widening and deepening of the canal as had been testified to, in order to make the full use of the 1347 second-feet. That when

(Testimony of John C. Boyle.)

this should be done the following would be the effect of the water upon plaintiff's Lots 1 and 2, namely:

The maximum amount of power could be obtained from the proposed power-house when the water surface elevation is maintained so no water is running over C–C, as shown on Plaintiff's Exhibit 2.

Asked what effect would this have upon the thread of the stream, what change if any would thereby be made from the same as it is now shown on Plaintiff's Exhibit 2, he answered:

That when there would be no water flowing over section marked "C–C," the thread of the stream would be moved westerly at section C–C to the center of the forebay or intake of the power canal. Asked how much approximately the thread of the stream would be fluctuated by these uses of the water according to the demands of the cement mill, he answered: That the thread of the stream would be moved to the center line of the forebay or intake canal opposite C–C, or it could not be moved at all, according to the load required at the cement mill, and the amount of water permitted to flow over section C–C. That the thread of the stream as indicated on said Exhibit 2 would be fluctuated back and forth, according to the load from [142—50] time to time as utilized at the cement mill. That the greatest distance that the thread of the stream would thereby be changed, moving westward from its present location, would be one hun-

(Testimony of John C. Boyle.)

dred to one hundred fifty feet, opposite the lower end of Lot 1, between the south end of Lot 1 and section C–C.

Asked what would happen if the varying quantity of electricity that would be required, from time to time with reference to the amount of water that would be left on plaintiff's Lot 1, during the fluctuating operations; whether there would be places that would be entirely without water above the line C–C and the condition below that line.

He answered: That above section C–C he doubted if any operations would take all of the water out of the pond, which might be called a "forebay" to the intake gates; that the river bottom there is considerably lower than the water surface; that at section C–C, which controls the flow of the water on the east side of the river, there would be no water flowing, and so below or down stream from section C–C, the river would be dry at times, and having water flowing on it at times, depending upon the operation of the cement mill. That during such conditions there would be water flowing over the spillway below C–C; that if the water surface is maintained below section C–C at the spillway elevation, Lot 1 would be dry as all of the water would be flowing through the power canal through the power plant.

Asked as to the purpose of such intake gates at the head of the canal, the witness said that there were two principal purposes: one to protect the canal and power-house from excessive [143—51]

(Testimony of John C. Boyle.)

stream flow, and the other to shut off the water in the canal in case of emergency, such as breaks in the canal, or work to be done at the power plant itself. That, as a matter of plant operation, it is not practical to use headgates to control the quantity of water that is put through the turbines, because the water level maintained in the canal is determined by the amount of power developed at the plant. This automatically takes care of itself. Then when the gates are closed the water finds its way out at the lowest point, which would be the spillway elevation, and the elevation at section C–C.

That if the shattered area should not be removed but left as it is, and there is just a natural flow of the stream, then under normal conditions two-thirds of the water would flow to the west side below and west of A–B and B–C without excavating in the reef.

THE CITY'S DECREED RIGHT OF 220 SECOND-FEET AND THE McCLURE DECREED RIGHT OF 75 SECOND-FEET.

The witness' attention was called to the city's claim to 220 second-feet, adjudicated to it, plus the 75 second-feet adjudicated as the McClure right; which latter right is on the plaintiff's side of the river.

The witness was asked that if, assuming that the defendant city desired to use the total of these two rights, to wit: 295 second-feet at the defendants' proposed plant, whether or not this

(Testimony of John C. Boyle.)

quantity of water could be taken into the plant, without the removal of any of the shattered area; that is, whether water flowing in a state of nature would find its way down into the head of the defendant's canal. [144—52]

The witness answered: Yes, that even with extreme low water in the river, the defendants could still get the said amount of 295 second-feet without making the excavation of the shattered area, that is, the removal of the rock shattered by the explosion.

SHEET 2 OF PLAINTIFF'S EXHIBIT 6 WITH REFERENCE TO THE REEF MARKED "C–C."

The witness was asked to take Plaintiff's Exhibit 6, sheet 2 thereof, and state what engineering stations were shown on that page, which corresponded to the reef C–C, and answered:

The stations shown on Plaintiff's Exhibit 6, sheet 2, and designated by the letter "K" run from Station 20 plus 20 to Station 21 plus 15, or thereabouts. That the heavy line running through those stations indicated the profile of the river bottom at that section. That according to this profile (on sheet 2 of Plaintiff's Exhibit 6), the lowest point shown is about 68.2, that is, an elevation of 1068.2. That the highest point between these stations just given is elevation 1071. The highest point on this section C–C may go clear out to beyond the bank of the stream.

(Testimony of John C. Boyle)

The witness was then asked when the river by the operation of the cement mill, as before described, should be drawn down so that no water would pass over the reef at the lowest point, 1068, what effect would that have upon the quantity of water at Lots 1 and 2, and the thread of the stream. He began his answer and the Court interrupted that he had answered that question, stating that he had already answered that as to the thread of [145—53] the stream, and the amount of water that will be below the reef: That there would be none, and that the thread of the stream would move over westerly for a hundred fifty feet.

The Court asked if that were not correct, and plaintiff's counsel replied that he thought that was all right,—that he was approaching another matter and tying it in. The question was then read to the witness, and he answered that there would not be any water flowing in the river channel flowing down stream from section C–C; neither would there be any water on section 1 (Lot 1), if all the water were taken through the power canal. Asked what the stream flow at any particular time would have to do with the question,—he answered that the stream flow from a minimum up to 1347 second-feet would be entirely under the control of the cement company's power plant, and the most power could be generated from the stream at any time from minimum up to 1347 second-feet when there would be no water flowing over section C–C. The witness stated that at any time when the flow in

(Testimony of John C. Boyle.)

the stream was less than 1340 second-feet, the greatest amount of power could be made at the cement company's plant by taking all of the water from section C–C.

That as to whether or not the Cement Company would lose power in proportion to the amount of water that was allowed to pass over the reef C–C, he said that at any time when the water surface elevation got above the controlling elevation on C–C, there would naturally be a loss of water at the cement mill. That there could be a loss of water up to the maximum capacity of the cement plant; that the amount of water might range from nothing up to a full discharge of the river at the spillway. That in the ordinary operation of the cement plant, the usual thing to do would be to draw the water from plaintiff's property whenever the flow was less than 1340 second-feet; that naturally [146—54] if the power is required by the Cement Company's use, it would be economical and proper in the operation of the plant to draw all of the water—get all of the water available. Speaking of the economical operation of the cement plant, he stated that it would be economical to draw the surface elevation below 1068, if the demand of the plant was more than could be generated under normal flow of the river. That by that, he meant that it is possible to use a certain amount of water that is in the forebay, and above the upper reef as pondage, and increase the river discharge above

(Testimony of John C. Boyle.)

what would be flowing in the river, in order to carry the peak load on the plant.

That assuming that there was a flow of 5, 6, or 700 second-feet in the river, that the pondage then on plaintiff's property would enable the cement plant to run at its peak requirements for a short period of time by drawing a greater quantity of water than the normal flow at the time. Asked how long it would take to thus draw the water down, he said that, of course, would depend upon the demand of the plant; that for example: If the river flow was 750 second-feet, the river discharge could be increased—the discharge in the canal to the power-house could be increased, to 2,000 second-feet by drawing the surface down two feet for a period of two or three hours; but that as soon as the pondage should be used, the output of the plant would necessarily be controlled by the 750 second-feet, and as the load on the plant dropped, the pondage would again build up.

He stated that with the elevation at 1068 at the reef that under the defendant's plan of operation, the quantity of water would be the controlling factor. Because this is a low head development and the difference in elevation of one or two or three feet is not the controlling factor in the power output of the plant. [147—55]

THE TWO HUNDRED NINETY-FIVE SECOND-FEET.

He said that with a water surface elevation of 69 and a 23-foot effective head at the power-house,

(Testimony of John C. Boyle.)

the plant would make 475 kilowatts. That the requirements of the Cement Company depend entirely upon its operation and the amount of power taken by it from plaintiff company for the Cement Company's purposes varies during different times of the day, and different times of the month and year, up to a maximum demand in 1930 of 1312 kilowatts. He stated that the 220 second-feet, at a surface water elevation of 69, and an effective head at the power-house of 23 feet, would give 350 kilowatts. He stated that assuming the same conditions in the use of the 220 second-feet as were assumed in the use of the full 295 second-feet, with a surface elevation of 69, and an effective head of 23 feet, 350 kilowatts would be produced at the proposed plant. (Tr. 132.)

STAND-BYS. (Tr. 134.)

The witness stated that the plaintiff had seven plants that were operating as stand-by plants, as a part of its property, and they are connected with five sawmill plants at the present time for stand-by service. That the five sawmill plants are not the only steam plants which plaintiff has as stand-by plants, but the plaintiff is operating one steam stand-by plant which is at Coos Bay.

He stated that the fundamental purpose of a stand-by plant is to pick up the distribution load of a community in which it is located and to regulate the voltage in which it is located for proper service to a customer. That the [148—56] plaintiff requires the property in question for this pur-

(Testimony of John C. Boyle.)

pose, and this is the purpose for which the plaintiff acquired its property involved herein. That such property is useful for carrying out the plaintiff's business in the community in which the property is situated.

That the witness does not think it practicable to use the Gold Ray plant for stand-by purposes; that he has made a study of the Gold Ray situation, and the controlling features of the plant are, first: That if the water-level is raised any higher than the water-level at the present time, it will overflow considerable portion of orchard land around the reservoir; it will encroach upon the Southern Pacific right-of-way, and the present type of structure will not permit any greater height, and this present capacity is fifteen hundred kilowatts, under its present stream flow.

Cross-examination by Mr. KOLLOCK.

The location of the stand-by plants are as follows: One at Gold Hill (Gold Ray), two in the city limits of Klamath Falls, one at Keno, just a short distance from Klamath Falls, one at Shasta River, close to the town of Yreka, one at Winchester, close to the town of Roseburg, and one at North Bend on Coos Bay. That the old original plants were built for service for the particular communities. They afterwards became interconnected on an interconnected system for stand-by service. That the plants were originally constructed for serving the local communities, [149—57] and for that pur-

(Testimony of John C. Boyle.)

pose they would be considered stand-by plants, and still are, after having been connected up.

He testified that if a plant serves a local community, it is a stand-by for that community. That the Gold Ray plant was built before thw witness' connection with the plaintiff. That prior to his employ by the plaintiff he was in the employ of the predecessors in interest of the plaintiff, California-Oregon Power Company. That the name of the plaintiff is The California Oregon Power Company. That it is to all intents and purposes the same corporation following a reorganization.

That of the Klamath plants two were originally built without reference to the entire system, one of which is still used by the plaintiff as a stand-by plant, but was originally a stand-by plant serving the community without connection with the other system. That such stand-by plants run continuously and are in continuous service. They regulate the voltage in case of line interruption. That they are in continuous operation except to regulate voltage in case of line interruption. They serve an emergency and are operated continuously irrespective of emergencies.

He stated that it would be impractical to increase the Gold Ray plant for reasons stated, but admitted that the company had the power to condemn, but stated that damages would perhaps be pretty high, and that it was impractical from the standpoint of expense. That the right of way of the Southern Pacific abutts upon the dam at Gold

(Testimony of John C. Boyle.)

Ray, or within a few feet thereof about ten feet. That the dam itself is an old timber crib, which could not be rebuilt to that height. That below that point the plaintiff has investigated the entire territory [150—58] with reference to building an entirely new structure below the Gold Ray dam to the same height as Gold Ray dam. That no plans have been made for increasing the height of it because of the expense. That he has been over the site several times personally, and surveys and measurements have been made by the plaintiff's employees, Mr. Olsen and Mr. Warren, under the direction of the witness.

That the measurements of water at the various points to which the witness has referred were based upon Mr. Olsen's investigation and the testimony of Mr. Muirhead.

His attention was called to the fact that he had testified about the continuous reef across the river, commencing on the west bank following the line marked "A-B," running more or less directly across the stream, then the line north and south, following practically the main direction of the river itself; then on another line C-C. He was asked if there were not various openings in that so-called reef, and answered affirmatively; that one-third of the total flows on the line that passes through the so-called reef marked "A-B," as the stream now exists. That approximately two-thirds passes in the channel across the line marked "B-C" on plaintiff's map from east to west. He did not know the depth

(Testimony of John C. Boyle.)

of the channel, except from the testimony. (Meaning that he had not personally made any measurements as to the depth.) He referred to the testimony of Mr. Muirhead, Mr. Olsen and to the exhibits. That Mr. Muirhead testified to the amount of water flowing in the various channels in his previous examination.

He was asked if it was not a fact that the reef did not furnish much obstruction to the flow of the river, but answered that it did; that it holds the river at a higher elevation at the openings than the water is below, but allows [151—59] two-thirds of the river to pass over, through what is called the reef.

He testified that the water was shallower on the line B-C than east of it or west of it. That he obtained this information from the cross-section that was taken. That there is a cross-section B-C, shown upon one of the drawings submitted to the State Engineer. He stated that it is shown on sheet 2, filed with the State Engineer April 3d, 1931, and the cross-section is shown as a solid section between plaintiff's stations 20 plus 20 and Station 22, which follows the line very closely, indicated on plaintiff's exhibit as line B-C—practically the same section as B-C. The witness was referring to what was then marked as

DEFENDANT'S EXHIBIT "A" FOR IDENTIFICATION. (Tr. 143.)

The witness stated that his answer had been given with reference to that exhibit. The witness testified that when the river should be drawn down below 1069 or 1068, there would be no water passing over the reef marked "C–C." That he drew this conclusion from Plaintiff's Exhibit 6, cross-section to which he had referred, and solely from that. That, according to the date on the exhibit, the cross-section was made in 1926. That his statement that the reef would thus be dry is drawn from the profile made in 1926, and also from present conditions, having been there and looked at the river channel on several different occasions. That he had not gone across to the line C-C, and made any determination of the depths at various points, and had observed the reef on line C-C only from the shore. No water would pass over the reef under the conditions described, because the reef is itself higher than 1068. That the result of so drawing [152—60] down the water, would be that the thread of the stream would be moved over from one hundred to one hundred fifty feet to the west. That if, as a matter of fact, at the point in controversy, at an elevation of 1068, there were a considerable amount of water flowing over the reef, and the river channel below C–C was completely covered with water, the thread of the stream would remain unchanged, in his opinion.

(Testimony of John C. Boyle.)

He was then asked:

"Q. And if by reason of the fact that some water was flowing over, the flow line of the bank were moved somewhat, but not so much to the west of where it is as to be entirely dry, the thread of the stream would be moved proportionately less?"

He answered: "Yes, sir." (Tr. 145.)

He defined the thread of the stream as a line established in the center of the stream equally distant from all points on the bank of the stream perpendicular to the thread of the stream at extreme low water. That by the bank he meant the point of contact of the stream and the bank at low water.

He was then asked:

"Q. The surface of the water is what is involved; off course would not measure to a point higher up than the water was, and by the bank you mean the point of contact between the water and the land. Isn't that true? A. Yes.

Q. The thread of the stream is not dependent at all upon the volume of the water that flows on either side, providing the condition of the surface remains continuous.

Q. That is correct." (Tr. 146.) [153—61]

He stated that the plans submitted in evidence showing the proposed construction of the electric plant by the defendants give all of the details necessary for properly estimating the cost of the plant. It does not give the details of the electrical features. That is of the electrical operation of the headgates, as to the automatic control of the gates at the tur-

bines, they show that the gates will be operated automatically. They do not show or describe the method, because the gates are there and they operate only in a certain way with that type unit; that there is not a great deal of difference in the unit types, that would come within the general description furnished by the State Engineer by the maps of the defendant Cement Company. There is some detailed difference but it is not material. That he knows the exact method of gate control there, and as disclosed by the filings made in the State Engineer's office.

That through the demands of the peak load upon the electric plant, the flow would—in such an automatic plant—increase to a point where it would take care of the load. That there is no automatic limit to the amount of water which would be drawn through the gates; that this depends upon the demand of load; that the load is the demand. That there is no automatic limit upon the amount of water drawn through the gates, except the demand of the load. That you cannot operate the plant automatically and still limit its capacity. That the plant cannot be so regulated that not more than a certain amount of water will be drawn from the stream through the plant under varying load conditions. That you might limit the maximum point or the maximum amount you could take from the plant but below that maximum you would have no control [154—62] over it. But that you could so set it that the maximum would

(Testimony of John C. Boyle.)

not be passed. So that it is a matter of operation by the company of this machinery. That you could set the machinery so that it should not so operate as to take more than a certain amount of water through it. But that you could not so set the machinery that a given head will be maintained at the gates with a given elevation so as not automatically to draw the head down below a certain point. That you cannot set this machinery so automatically the water would not be drawn down below 1069. That it would depend upon the load that you are carrying. The water elevation would depend entirely upon the load you were carrying up to a limit, if you want to put a limit on it, but that that limit cannot be put at a point which will maintain that elevation at the headgates. It is an engineering impossibility. The witness stated that he had done both electrical and civil engineering. That his degree was in civil engineering only.

He stated that by lowering the water at the headgates of the defendant's canal, all of the water could be drawn up to a discharge of 1347 second-feet. That if, at the time, there were only 1,000 second-feet of water flowing in the river, the operation would draw all of the water flowing on either side of the west bank above the point into the canal.

He was asked and answered:

"Q. Suppose there were only a thousand second-feet of water flowing through the river, then at this point where the narrows go through, and approxi-

(Testimony of John C. Boyle.)

mately the ultimate proposed point, eastern extremity of the proposed wing-dam, you could draw all the water flowing on either side, on the west bank above the point, into the canal? A. Yes." [155—63]

Asked how much it would have been necessary to lower the bottom of the canal at the headgates to accomplish that purpose, he stated it would be necessary to lower the bottom the amount shown on the blue-prints of four to four and one-half feet, three feet, as shown on one of the exhibits; then if you lowered the water elevation, it would draw all of the water of the river from there on down to the power-house. That the water immediately east of the eastern extremity of the proposed wing-dam is more or less still, or in a pond considerable deeper than the water below the reef on one side. Asked if it is not, as a matter of fact, deeper than the bottom of the channel through the narrows, he answered: That does not affect the water surface.

He stated that it was considerably deeper than the water at the bottom of the canal through the narrows; that he did not know how much deeper. He believes it is shown on the lower cross-section taken as A–B. That on Plaintiff's Exhibit 11 the depth is shown as approximately nine feet immediately east of the shattered area.

He stated that in his opinion if the water at the point of diversion should not be reduced below a surface elevation of 1069 that the east channel would

(Testimony of John C. Boyle.)

not be dry at the point marked reef "C–C." He thought the water would flow over most of the reef under those conditions. As to whether or not the thread of the stream would move to the west, he stated that it would only move in the amount of the lowering of the water below its water-level proportionate to the horizontal recession of the water from the shore rather than the depth of the water.

He was asked and answered:

"Q. Do you think there would be any change in the thread of the stream at that point under any circumstances?

A. That is above section C–C? [156—64]

Q. Below Section C–C, right at the end of it; part above, and part below; passes apparently along a long island there.

A. I think above Section C–C the thread would remain as it is.

Q. Irrespective of whether it passed in the water or on the land; and from C–C if and only if the reef were dry would the thread of the stream move to the west? A. Yes." [157—65]

JOHN BOYLE, redirect examination.

(Questions by Mr. REAMES.)

The witness testified that with a water surface elevation of 1069 at the intake gates of the canal, the thread of the stream below the reef marked "CC" would be transferred to the west as you proceeded nearer the canal entrance.

He testified that it is not practical to control the

(Testimony of John C. Boyle.)

amount of water that goes into the electric plant so that a certain amount only would be used in the manner suggested in the previous cross-examination. (That is by regulation of the gates at the canal entrance.) That it is not commonly done in operations as such would be had at a plant like a cement works. He stated that when he had before testified as to the type of plant that was to be used by the cement company as the same is shown upon the plans of the defendant company filed with State Engineer, he also used the information gathered by him from the description of the plant given by Mr. Muirhead when he had been on the stand the day previous. He stated that this had particular reference to the automatic operation of the plant.

He testified that in giving his foregoing evidence about the division of the water of the river at the reef and referred therein to the testimony of Mr. Muirhead in the former trial he was referring to the former trial of this particular case,—that is,—the first trial thereof; that he referred to that portion of that testimony where Mr. Muirhead had testified that he and Mr. Allen had made accurate measurements of the discharges through the various three sections of the reef.

At this point plaintiff's counsel asked to be copied into the evidence the testimony of Mr. Muirhead so referred to in the examination of the witness from pages 64 and 65 of the transcript of the former testimony which was marked lightly for the purpose with a red cross and check from "At

(Testimony of John C. Boyle.)

[158—66] the point marked 'B' by Mr. Olsen?" down to the interruption near the bottom of the page, ending with the word "therefore it is,—" Objection was made, and the following occurred:

"Mr. KOLLOCK.—I object to the introduction in evidence of any part. I understand Your Honor to rule the entire record of testimony is in for all purposes, which means the right of counsel to refer to it in any way; but I don't see why any part should be introduced formally into evidence and copied into the testimony in this case.

Mr. REAMES.—This is simply that the record of this testimony will be complete, and it will save the Court going back and forth, and while it was all considered in, I am calling particular attention to these parts.

COURT.—You can call the Court's attention to it in that way, by the introduction of all the record. The Court will not order it copied into the record. The whole examination is in evidence, as I understand, for all purposes. If you desire to call the Court's attention to any particular part, the Court will be glad to look at it.

Mr. REAMES.—These are very short parts, and I thought I should read them in.

(Inasmuch as the Court did not rule out the evidence offered, but only did not permit it to be copied into the record because it was already embodied in the transcript which had been received in evidence, the portion so offered is, by agreement of counsel, here set out as follows:) [159—67]

(Testimony of John C. Boyle.)

"Q. Is that the point marked 'B' by Mr. Olsen?

A. That could be the narrows,—this point shown as 'B' by Mr. Olsen; and it carries a good portion, almost fifty per cent of the flow of the stream, at the present time. However, if we are to utilize this to its maximum development, under such water as we can get coming to here, this opening will not pass enough water to give us any development of any consequence. So we would need a larger opening.

COURT.—You say passes fifty per cent of the stream now?

A. I can tell you exactly what it passes, or very close. On the day we took these measurements it was passing four hundred fifty-five second-feet; 455.8 second-feet; the total flow of the river that day being 1086.9.

COURT.—About half of the stream.

A. Those stream measurements were not taken at the Government gauge at Tolo, they were taken right at the site, by as accurate measurements as we could devise, and at the present time there is quite an opening there.

Q. Where?

A. At this point marked '2'; there is an opening there that is permitting 333 second-feet of water to flow through.

Q. Flow through which way? [160—68]

A. Flowing to the west bank at this point on the day that these measurements were taken; total reading was 1086.9 on the river, and we were getting 333

(Testimony of John C. Boyle.)

second-feet, with a small variation, through that point. Now our contemplated work plans on extending this dam up here, solidly up here, with no openings through here, across that stretch up to here; therefore this 333 second-feet that is now flowing through there would be stopped from flowing through there, and would pass on down here. Therefore it is—

Mr. Boyle's attention was called to the fact that he testified concerning his connection with the predecessors in interest of the plaintiff and his having said that he had been many years with its predecessors. His attention was called to the fact that the Gold Ray Realty Company was the predecessor of the present California Oregon Power Company and he was asked if he had ever been in the employ of the Gold Ray Realty Company to which he replied that he had not. He was asked if he were with the Siskiyou Light and Power Company and the question was objected to as leading and the Court sustained the objection and he was then asked: "What of their predecessors did you work for?" and answered that he started to work for the Siskiyou Electric Power and Light Company, afterwards taken over by the California Oregon Power Company. (Tr. 155.)

Recross-examination by Mr. KOLLOCK.

He testified that he was acquainted with the defendant cement company's power requirements; that it was not a fact that such a user was a very

(Testimony of John C. Boyle.)

constant user of power with little variation during the twenty-four hours; that the defendant [161]—69] cement company is not in constant operation as compared with other loads which the plaintiff has; that the Cement Company's demands may vary from nothing to 1312 kilowatts during the season. He testified that it operates on a twenty-four hour basis, if operating at all; that during that period of operation its load is uniform, but the load factor, compared with other loads, is comparatively small, meaning that the load factor is the ratio of the maximum demand to the average demand during a given period of time; and that is, the average demand over a period of a month or two months. But that during any one twenty-four hours of operation the load is very constant, while during thirty days in the month on which the load is usually figured, and the maximum demand being taken during the month, it is not in constant operation. (Word "not" omitted in transcribing.)

He testified that during any twenty-four hours the load is comparatively constant. Asked if there were any more constant load on the plaintiff's system, he testified that there was,—namely, the dry-kiln in the lumber industry; that it has a very high load factor during the entire month; that that is not the only one that during any twenty-four hours will have a more constant demand for power than will a cement plant. Asked for others he replied, in motor loads like the ice plant, the flour mill, and that type of industry.

(Testimony of John C. Boyle.)

The witness testified that he was not familiar with the work that had been done by the defendants at or near the shattered area and prior to the explosion of dynamite referred to in the complaint. He testified that he did not know of any work done at that point since the explosion. He stated that he doubted whether the blasting that had been done had now changed the thread of the stream, in fact that he knew that it had not changed the thread. He was asked what effect on the thread of the stream, if any, would be had simply by removing [162—70] the shattered rock without changing the headgates or the canal or lowering it or widening it and testified that the lowering would depend on whether they took any water through the present canal and upon the amount that goes through the present wing-dam,—that is, the end of the proposed wing-dam. He stated that the amount of the change would depend upon the quantity of water taken. He again testified that he did not think the mere shattering of the rock without its removal would change the thread of the stream; that he does not think the shattering of the rock alone has had any effect upon the reef marked "CC." He testified that he thought that the amount of water that flows through the channel where the shattered rock remains and section B–C is sufficient to supply what the defendants take through their canal and that there hasn't been any difference in the water surface elevation to speak of and no difference,—no change in the river dis-

(Testimony of John C. Boyle.)

charge; that the discharge through defendant's canal depends entirely on the water surface and the bottom of the canal excavated. On a low head plant the quantity of water is the determining factor on power output of the plant.

Asked what two elements entered into any power development he answered quantity of water and distance through which it is dropped, which is head; that the quantity of power developed depends upon the head multiplied by the volume of water, but that you can reduce your head on these small developments, obtain more water and get a consequently greater output of power although it still remains true that the head multiplied by the volume of water determines the power development.

The witness said that in his testimony he had assumed an effective head in the defendant's plant of twenty-three [163—71] feet, depending upon the quantity of water; that if the quantity of water is increased so that,—in order to get the discharge through the canal the water surface had dropped, the effective head might be somewhat lower than twenty-three feet to take care of the friction losses at the canal gates; that under normal conditions of low water in the river the witness thought twenty-three feet would be a reasonable head on which to figure this development,—that is, effective head. He testified that the defendant cement company's monthly power bills for power purchased from the plaintiff varied from $251.60 a month to $5,696.08 during the year 1930; that the total cost of the

(Testimony of John C. Boyle.)

power used at the cement plant was for that year, $33,948.48; that he did not have the figures showing the cost at defendant cement company's quarry.

Redirect Examination by Mr. REAMES. (Tr. 163.)

The witness stated that the cement company operated about seven months per year; that the plant is operated when the market is best, which is during the summer months; that there would be more water available in the river during the spring time; that the cement manufacture would probably start during that time and extend through the summer; that according to the records kept by the plaintiff the maximum operations of the defendant cement company were during March, April, May and June; that July is a low month,—August, September and October are high months. That the river will begin to rise in the month of December, depending upon fall rains; that it will continue to furnish [164—72] a greater supply of water up to about May or June. The witness said that some power could be developed with less than twenty-three feet head providing all the water is taken from the stream and the pondage above the intake gates utilized. The witness said that he was not present at any former trials between the parties hereto except the first trial of this case in Medford the year previous.

As to uniform loads, the witness testified that the mining dredge on Foot Creek has practically a uniform load and that it is a big consumer.

Plaintiff rests. (Tr. 165.)

TESTIMONY OF FLOYD W. ALLEN, FOR DEFENDANTS.

FLOYD W. ALLEN, a witness called for the defendants.

Direct Examination by Mr. KOLLOCK.

The witness testified that he is a civil engineer, has been practicing that profession since 1906 in the states of Washington, Montana, and Oregon and in Alaska; that he was not a graduate, but had three and one-half years education in the University of Washington and is a licensed civil engineer in Oregon; that he has been employed by the defendants City of Gold Hill and the Cement Company in connection with the proposed water-power development on Rogue River in the vicinity of Gold Hill; that he was first called in consultation in July, 1926. He talked with Mr. Muirhead who consulted him pertaining to the development of a power site on Rogue River and the witness advised a complete survey of the site; that these [165—73] surveys were made by Mr. White whom the witness later joined; that White is a civil engineer at Grants Pass. That from surveys and studies preliminary plan quite complete in detail and sufficiently elaborate for filing in the State Engineer's office were made. That plan had a certain outline of development which is covered thoroughly in the report to the defendants.

The dam contemplated was a concrete structure which would be termed a diversiion dam extending

(Testimony of Floyd W. Allen.)

from concrete headgates which had been previously constructed by predecessors of the defendant city extending northerly along the westerly line of the thread of the stream; that is, northerly over the,—here there was an interruption,—

The witness explained that all exhibits that are filed here from the State Engineer's office files were all maps. That for the purpose of explanation,—here the witness picked up Exhibit 7.

He was asked what the exhibit is and plaintiff's counsel objected that if he was about to ask his witness to describe the plans and specifications that were involved in the condemnation suit, it has nothing to do with this case at all. Counsel for the defendant explained that he was not asking about condemnation.

The witness stated that this is a complete copy of maps filed in the State Engineer's office in connection with the water filings in behalf of the City of Gold Hill on Rogue River on the site in question; that these were filed December 3, 1926.

The exhibit was marked Defendant's Exhibit "B," the same being Plaintiff's Exhibit 7. (Tr. 168.) [166—74]

The witness stated that the drawings were filed December 3d; amended July 3, 1928, and that these comprised Exhibit "B."

He explained that sheet 1 of the exhibit is identical with the original filing with the State Engineer; that prior to this date there had been constructed concrete headgates in the southerly portion of Lot

(Testimony of Floyd W. Allen.)

8, Section 15, Township 36 South of Range 3 West, marked "A" to "B."

Tracing the course of the proposed dam from that point he said "A" to "B" marked on the map is the headgates that were in prior to this date and are still in on this site. "B" to "C" is concerte diversion dam constructed prior to the date of this survey and the date of this filing. "C" to "D" is also partial diversion or wing-dam constructed prior to the date of this survey. From "D" to "E" is the proposed extension of the permanent concrete wing-wall or dam terminating on the rock island in the center of the stream, "E" to "F" is diversion dam extending from the island to the easterly bank of the Rogue River, and "F" to "G" is a wing-wall extending to the easterly bank and terminating in Lot 1, Section 15, Township 36 South of Range 3 West.

The following then occurred:

Mr. REAMES.—May I interrupt, to save time; you mean proposed?

A. Proposed.

Mr. REAMES.—Isn't constructed?

A. No.

Q. From what point was it then proposed to—

COURT.—He has explained that, from D on. The [167—75] Court has it. Now all this testimony so far *as* referred to Sheet 1 of this Defendant's Exhibit "B."

Q. Mr. Allen, you trace a line from the point marked "B."

A. No, I scratched this "B" out.

(Testimony of Floyd W. Allen.)

Q. What do you mark this point?

A. Nothing.

Q. Trace all the way through; from point indicated on the map as lying immediately north of the island upon which that proposed construction would terminate is a fine blue line tracing out to a point further up the river from that. Will you state what that indicates on the map. By the way, you prepared all these yourself, didn't you?

A. I did, yes. On December 31, 1926—no, July 9, 1928, the plan of development was changed, whereby the diversion dam was to be constructed, or proposed to be constructed to the west, immediately west of the thread of the stream, marked on the map H to I, and I to J. (Tr. 170.)

The witness stated "I" is on the main island on the largest of the islands, and "J" was upon a smaller island near the thread of the stream. It was proposed from "J" on that island in the thread of the stream, to construct a diversion dam approximately,—diversion dam to an old crib existing prior to 1926 and marked from "J" to "L." That this left a slight opening between "L" and "M," "M" being upon the main land on the easterly bank of the Rogue River. This plan was again necessarily altered at a later date you might say prior to the case in equity,—prior to that,—whereby the main wing-dam crossing the Rogue River was changed from the fourth island to the third island from the westerly banks. This was necessitated by the fact [168—76] that after an examination of

(Testimony of Floyd W. Allen.)

the island to the extreme west from the westerly shore that island had been destroyed by high waters preceding this plan of procedure; that island "J" was almost destroyed by the high waters of 1927; that then the terminal point was shifted to the island marked "N"; from that construction was started to close the gap between the island "N" and the old log crib existing prior to the flood of 1927, marked on the map from "N" to "L"; this work was stopped by injunction and suit in equity, so this plan was altered to partial closure, which contemplated building the wing-dam to the thread of the stream along the line "N" to "L" and extending only to the thread of the stream. The proposed construction is on the amended subsequent filing, certified copy of it. This is

PLAINTIFF'S EXHIBIT 13

shows to all practical intents the same wing-wall as shown on sheet 1 of Plaintiff's Exhibit 7 or Defendants' Exhibit "B" from station or from letters marked "B" to "H.", From "H" to "O" the plan of diversion wall was changed slightly to meet the main island as shown on the plat at "O." From "O" to "P" was a slight change throwing the proposed diversion dam a little further to the west than the previous map showed and from "P" to "N," which is in common with "N" on sheet 1 of Plaintiff's Exhibit "F." The proposed wing-dam is shown extending thereon from the island marked with "N" to point "Q," being approxi-

(Testimony of Floyd W. Allen.)

mately the center or thread of the stream. This is the maximum extension of the proposed diversion dam; the entire proposed wing-wall is entirely west of the thread of the stream. (Tr. 172.) [169—77]

Asked if he had any other map in relation to the proposed development the witness answered that he would like to give a quick explanation of all of the maps embodied in this record from the State Engineer's office which was permitted and he said:

Sheet No. 2 of Plaintiff's Exhibit 7, Defendants' Exhibit "B" is a profile of the construction of a concrete diversion wall as proposed in the fall of 1926. This profile extends from the present, the existing concrete headgates to an hundred feet towards the diversion wall northerly and easterly across the Rogue River and tending north on Lot one. Sheet 2–A is the plan of the wing-dam or diversion dam extending from the island, the easterly most island to the old Log Crib that was washed out in 1927.

The COURT said: "This portion was abandoned, of course?"

The witness answered this has been abandoned since that time. Sheet No. 3 is a map of that portion of the proposed development showing the existing canal from the headgates to the present power-house and extending southerly,—easterly to the proposed power-house upon the Rogue River. The map is divided into two sections, that portion in the upper right-hand corner joins with the por-

(Testimony of Floyd W. Allen.)

tion in the lower left-hand corner. He marked an X at the point of juncture and said: XX are points in common as shown upon this map. He said the water from the power-house discharged at a point on the map at the extreme right-hand side, which he marked with a "Y" as the point of discharge on Sheet No. 3. He said there is no change in this plan or map in the contemplated present development. That there is now existing on this old canal which was previously constructed several years ago a diversion dam forming an overflow spillway 160 feet in length, marked "ZZ" on [170—78] the map and 340 feet south from the headgates of the canal. This present diversion or overflow spillway is an elevation of 1068.33 and is to be raised to 1073.75. That there are at present the emergency spillway gates at a point 1950 feet south from the headgates of the canal and at the entrance to a flume to be constructed from the end of the canal to the power-house; that this is not a spillway or an overflow spillway, but is for the purpose of draining the canal in case of emergency. That sheet 4 is the contemplated cross-section of the entire canal from the headgate to the entrance of the flume, a total distance of 1950 feet; that these cross-sections are based upon originals,—the plan of work as shown upon these cross-sections are based upon original contemplated work whereby the river elevation would be maintained at an elevation of 1073.00. Since then the contemplated work and the inability to close the stream has necessitated a lower water surface at the point of diver-

(Testimony of Floyd W. Allen.)

sion to an elevation of 1069.00. This will necessitate the lowering of this,—lowering the cross-sectional area,—lowering the bottom of the proposed cut in this old canal from three feet at the headgates to 2.6 feet at the point of entrance to the flume. He explained that he meant to the point at the upper end of the canal. That the point of diversion he refers to would be opposite the upper end of the wing-wall, or opposite the point of the area blasted. That when he mentioned three feet below the cross-sectional area he meant three feet below that contemplated; that that would necessitate from three to four and a half and to five feet lower than the present condition of the canal.

That sheet 5 is a proposed cross-section of the flume extending from the end of the canal to the present power plant and thence on to the proposed power-house upon the banks of the Rogue. [171—79]

That this section would remain in all practical purposes the same as the original filed with the exception of the necessity of lowering the bottom of the flume to depths of two and a half feet to be able to maintain and pass through the given quantity of water which they had appropriated and at the elevation of 1069.00 at the point of diversion. He stated that sheet No. 6 is the power-house that is now in existence, with such repairs and modifications to place it in workable economical operation.

That sheet No. 7 is a general plan and elevation of the proposed power-house on the west bank of the river at the point of return of the waters diverted,

(Testimony of Floyd W. Allen.)

which contemplates two units of approximately a thousand kilowatts each, or with total theoretical horse-power of approximately three thousand. He said that the elevation of these waters would be considerably lower under average conditions but the overflow elevation,—the maximum elevation that the plant will be operated will remain substantially the same as that of the plan of 1926, with an operating condition prevailing around 1068 and a fraction feet at the power plant itself. That this necessitates fluctuating head at the power plant of approximately three feet on the forebay, with such fluctuation of the tail waters that are prevailing in the Rogue River at such time of diversion. The tail waters are subject to rise and fall and the quanfity of water in Rogue River proper.

He stated that the waters of the forebay will vary from '67.5 to an elevation of '72.00.

The witness said that the elevation of the water will be maintained at lowest elevation 1069.00 above the headgate. [172—80]

The witness was then shown what was afterwards marked

PLAINTIFF'S EXHIBIT "C"

and explained that this photograph is the concrete work referred to as marked on Plaintiff's Exhibit "R" to "S," the concrete extending higher than the balance of it in the lower right-hand corner being in common with point R, and the arrow pointing as the end of completed work, being the point halfway between R and S, and S being in common

(Testimony of Floyd W. Allen.)

with point N marked in the photograph as the end of the uncompleted dam. He explained that the following was also shown on the photograph:

To the north and east is a temporary splash board or wing-dam placed there by the City of Gold Hill for maintaining the level of the water in the west channel to divert it down there through a canal for power purposes. That he did not know whether it was there then, but that it was there in October, 1930.

The photograph was then introduced as Defendants' Exhibit "C." (Tr. 176.)

The witness was then shown

DEFENDANTS' EXHIBIT "D" (Tr. 176)

and stated that it is a photograph looking south or downwards towards the headgates or the entrance of the canal. He stated that he was unable to identify a piece of revetment work along the western bank and that it had no particular connection. [173—81]

Defendants' Exhibit "D" received in evidence. (Tr. 177.)

The witness testified that he made measurements of the water flowing in the various channels and profiles of the bottom of the river at various points as a part of his duty, together with investigations and measurements of water and survey profiles. That Mr. John White assisted the witness in making the water measurements. They made them in the following manner:

(Testimony of Floyd W. Allen.)

First carefully cross-sectioned the channel in question determining the depth and area of the section so measured; took the velocity of the water at as many points as reasonably to expect accuracy,—reasonable accuracy in such measurements,—from two to three, to as high as 75 measurements to a cross-section; used two instruments,—one Gurley Electric, which he said is the most common of all instruments for such purposes, and another known as K. & E. Mechanical type. He said the Gurley electrical instrument showed a range from a four to as high as 10 per cent in excess of the mechanical instrument which might be expected under the conditions. That they determined their basis upon the larger quantity that the Gurley instrument recorded as being more accurate, recognized the most accurate. He was asked to take a map and point out the channel so measured, and the method of arriving at the results. He took map marked Exhibit "E" for identification,—

DEFENDANTS' EXHIBIT "E" FOR IDENTIFICATION (Tr. 178),

DEFENDANTS EXHIBIT E

231

S P R. R.W. Fence

CALIFORNIA OREGON POWER CO

Lot 7

Lot 8

ROGUE

RIVER

Canal

County Road

N

O

M

M

BEAVER PORTLAND CEMENT Co
GOLD HILL OREGON
SITE OF DIVERSION DAM
FOR POWER CANAL
FLOYD W. ALLEN
CONSULTING ENGINEER

(Testimony of Floyd W. Allen.)

and stated that the first measurement was made crossing the entire channel at the selected site approximately a thousand feet above the concrete pier existing at the [174—82] old log crib. This was measured in the manner previously described; that they went upstream so far in order to obtain as ideal a condition as practicable for the measurement of the entire stream without any division in the water. He marked the place on the map in red with a letter "A." He determined the entire flow of the river at that point on September 26th, 1930, was 1086.9. This is at from 10.10 A. M. to 2:45 P. M. The second measurement was made of what is commonly determined the narows, marked "B" in red upon the map and the determination of quantity of water made at this point was 455.8 second-feet. There were many small channels existing between an island immediately east of the narrows and the larger island in the center of the stream and they are marked C, D, E, F, and G. The total of this area or cross-section between the two islands is 332.9 second-feet. In this last-defined channel the water was flowing from the easterly channel to the westerly channel. This is marked by an arrow in red pointing to the direction of the flow that the stream has at that point.

He mentioned the points C, D, E, F, and G, and the east channel and the west channel, stating that through all of their testimony they referred to practically everything east of the thread of the stream as the east channel and west of the thread of the stream as west channel.

(Testimony of Floyd W. Allen.)

He stated that he made the measurement of the third section on the same day. On the 27th of September he measured C, D, E, and F, and G and also B. The measurement upstream was on the 26th. The conditions of the water were not exactly the same on the two days, but were corrected to the same common elevation so the readings would be in common. He stated that H is the [175—83] measurement of the east channel at the extreme lower end of the group of islands near the thread of the stream. The measurement at this point was 334.7 second-feet. On the same day there was a measurement taken between two of the islands and marked H-prime (H') which amounted to 23.8. This quantity of water was flowing from the west channel to the east channel. Measurement was taken between the westerly bank and the northerly-most island of a certain group and marked as "I" on the exhibit and this measurement was taken twice on September 28th, 1930. In the morning the total volume of water was 794.5 second-feet. This was before we opened, or practically opened to the best of our ability the temporary diversion dam to the south of the point in question and immediately north of the concrete headgates adjacent to the canal. All readings were corrected to conform to the average mean elevation of period of time that the original measurement was made on the 26th of September, which was 1069.91 feet at a point marked "Z" in blue on the exhibit. The west channel was measured again after opening of the dam,—our diversion dam below,—and found

(Testimony of Floyd W. Allen.)

to flow 867.4 second-feet under the same conditions as in the morning and stipulated change of the opening of the diversion dam below.

He testified that they are absolutely the same measurements given in the other case. He testified that he was familiar with the location of what is called the reef across the east channel and did not make measurements of the water at that point owing to the inability to accurately measure the water.

The determination of the quantity of water flowing at this point was,—he said,—based upon a section approximately a hundred feet south of that reef which had the entire flow over the reef plus the 23.8 second-feet [176—84] flowing from the west channel to the east channel. That this would make a total flow over the reef of 310.9 second-feet before the opening of the temporary diversion dam and a quantity of water of 238.0 second-feet after the opening of the temporary diversion dam. The witness testified that he made a contour of the river at the point which has been referred to as the reef indicated as "C–C" on Plaintiff's Exhibit 2; that there was included in his original plans shown on sheet 2 of Plaintiff's Exhibit 6, which is a copy of the records from the State Engineer's office and from a profile made in September, 1926, from a survey made by Mr. White; that the different projections on the profile were interpreted by himself and platted on the map by himself. He testified that the profile showed the lowest point in there to be 1068.0. Further questioned he said 1068 on

(Testimony of Floyd W. Allen.)

profile,—1 or 2 tenths. He was asked that if referring to the conditions existing in 1926 when the survey was made as to whether or not the lowering of the water to 1068 would leave the reef dry and answered: "lowering the water to 1068, if this was correct at that date, would leave the reef dry."

He testified that since that date he had had occasion to make a subsequent survey and cross-section at this point; he stated that he would doubt the accuracy of the rock reef even at the time of the survey, because interpreted or projected from a map of proposed contour; that was a preliminary survey with no intent of minute accuracy nor was it necessary for minute accuracy at that time.

He stated that Mr. White and himself and employees of the Cement Company made a survey on September 29, 1930, at a cross-section immediately above what is commonly termed the reef in this testimony. It was the [177—85] shallowest water that they could find up and down the stream in the immediate vicinity of this reef. He was then shown Defendants' Exhibit "F" for Identification (Tr. 184), and testified this is a cross-section or profile from a point on the center group of islands marked "R" on Defendants' Exhibit "E" out to "U," and "U" to "W." This cross-section of elevations were taken at every break at the highest and lowest depressions of that particular section extending across the east channel of the Rogue River at a point immediately above what is known as the reef. That this graph is based on actual surveys made by the witness and Mr. White on that

(Testimony of Floyd W. Allen.)

date. He stated that this cross-section entirely refers to elevation above sea-level; that each heavy line is a foot in elevation; that the lowest point in the entire section drops to an elevation of 1066.0 feet, which place on Exhibit "F" he marked with a letter "A." He marked 1066 with a letter "A," 1066.4 with a letter "B," and 1066.2 with a letter "C" and stated there is an island protruding above the water at points marked "D" and "E." That "D" is approximately a foot above the high water or the water at that date in the east channel. The elevation is 1069.6. That at the time they measured or made this cross-section, the water,—the increased volume of water was flowing down the west side due to the fact that they had opened up the temporary dam. That at an elevaton of 1068 the ridge there would be one section of water two feet deep at the deepest place and five feet in width; another 1.5 feet deep at the deepest point,—six feet in width; another approximately three feet in width [178—86] and 1.2 feet deep; another five feet in width and 1.8 feet in depth at the deepest point; a small section at the extreme east of three feet in width and approximately one foot deep. (Tr. 186.)

He stated there is a total effective width of sixty feet. As shown by this graph there would be approximately 24 feet out of the 60 feet of width of water flowing at an elevation of 1068; at the extreme easterly end of that the width would be 3 feet from the extreme end of tail end of the cross-section.

(Testimony of Floyd W. Allen.)

The following colloquy occurred: (Tr. 186, 187.)

Q. Raising the water elevation to 1069 feet flat, what would be the situation as shown by the graph to which you are referring, as to the amount of water flowing over the ridge, and as to its average depth and its approximate width over the ridge?

A. By calculations and projections I have determined that the amount of water flowing in the east channel,—

Q. But you are not answering my question. (Question read.) Not referring to the flume.

Mr. REAMES.—May I ask a question for my own information? Where is this 1069?

Mr. KOLLOCK.—Immediately above the ridge at a point which your witnesses have designated as reef.

A. It would be forty-seven feet in width, and the maximum depth would be three feet.

Q. Varying from what to three feet?

A. From nothing to three feet.

Q. And total width of what, did you say?

A. Forty-seven feet.

Q. Out of a total width across the reef of sixty?

A. Sixty. [179—87]

The witness was asked what effect their proposed permanent construction would have on the volume of water coming from the east towards the west at a point marked C to G on his plans of operation and answered the permanent work as proposed will cut off the flow from east to the west channel at this particular point. That would re-

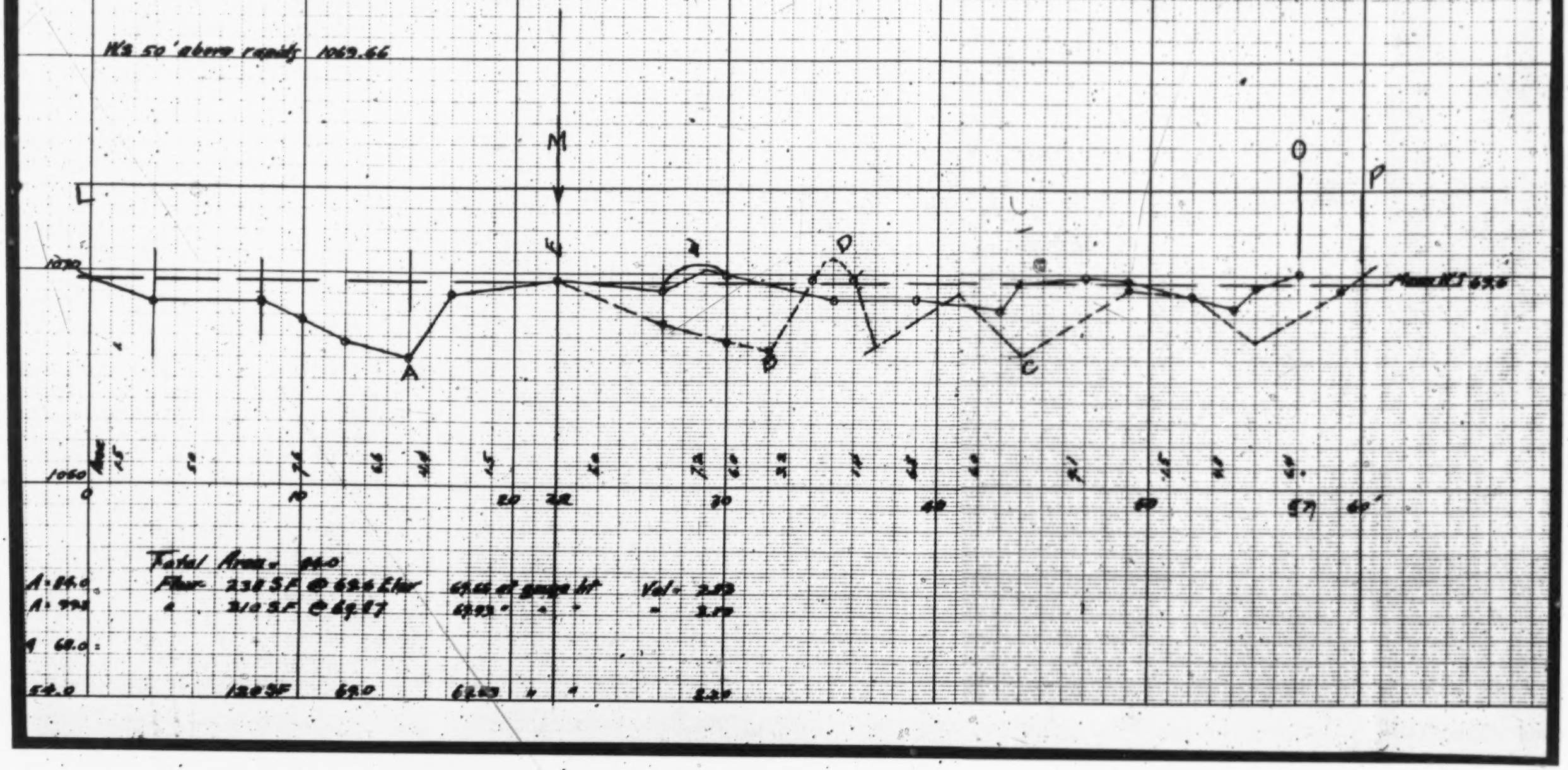
duce the amount of water coming down the west channel to their headgates by 332.9 second-feet; the total amount of the water in that given area.

DEFENDANTS' EXHIBIT "F" FOR IDENTIFICATION RECEIVED IN EVIDENCE. (Tr. 187.)

DEFENDANTS' EXHIBIT "F"

East Channel at Rapids
Sept 28-1930

Wt 50' above rapids 1062.66



Total Area 960

A: 66.0 Flow 238 S.F @ 62.6 Elev 62.66 at gauge ht Vol = 2.53
A: 72.0 " 210 S.F @ 62.87 62.93 " " " = 2.57
A 68.0:
54.0 120 SF 62.0 62.03 4 4 2.26

(Testimony of Floyd W. Allen.)

The witness testified that by his present plan of development as shown by the filings in the State Engineer's office and otherwise it is proposed to maintain an elevation of 1069.0 as a minimum elevation above the point of diversion in our upper wing-dam. That the point at which this elevation is to be maintained is shown on Plaintiff's Exhibit 13, marked "Q." That he had made a complete study of the entire site with the idea of the development and in that study he had found that the economical limits to which the water can be lowered and the head maintained would require that the water be maintained in Rogue River at a point of diversion "Q" at not less than 1069.0 feet. That an economical and efficient head would vary with the stages of the river from a maximum head of 23 feet down to as low as 15 on extreme high water; that the maximum head of 23 feet is under full development of 2,000 kilowatts and is when the river has a quantity of water flowing in it of 2450 second-feet; that is their highest effective head. That their effective head beginning [180—88] with 700 second-feet under full development would be twenty-three; at 800 it would be 22.7; at 900 it would be 22.6; at 1,000 it would be 22.3; at 1450 it would be 21. That when the river stage is 1347 second-feet, their effective head would be 21.3 feet at the power plant; that the effective head begins to fall off after the quantity of water in the river passes 2450 second-feet that the effective head is the elevation of the water maintained between the forebay, immediately adjacent to the power plant

(Testimony of Floyd W. Allen.)

itself, and the tail waters or waste waters of the power plant. The elevations of the tail waters are governed by the quantity of flow that is in the river proper. Asked what effect upon the efficiency of the plant or economy of construction or operation would the lowering of the head below that designated produce, he said that with the reduction of depth to maintain the quantity of water diverted would require first, the necessity of lowering the headgates, lowering their canal, lowering their flume, increasing the dimensions of their side walls, change in the type of turbines for the generation of power and also a changed and more costly unit of generator; lowering the head also reduces the speed of the generating unit. These lower speeds are higher in proportion per horse-power than the higher speeds up to a certain definite point. He stated that he had summed it up for a lower elevation than 1069 and had found the cost per kilowatt delivered at the cement mill would be greater under that condition than if maintained at an elevation of 1069.

His attention was called to Plaintiff's Exhibit 13 and he was asked to state whether the exhibit indicates the depths to which he had referred as shown by the graph which had been offered in evidence,—the depth over [181—89] the reef ,and answered there are partial depths and elevations of the bottom of the river at the point immediately above what is commonly termed the reef. These depths are marked at elevations 68.7, 66.0, 69.6, 66.5 and 66.1. He stated that these were the lowest

(Testimony of Floyd W. Allen.)

points in that vicinity,—the shallowest points,—not the deepest water across the point. For it is the shallowest continuous water across that channel. That it is shallower than the reef "C–C" on Plaintiff's Exhibit 2, by several feet. He stated that he had made further calculations as to what effect upon the volume of water flowing in the east channel would result from maintaining an elevation at a point of diversion of 1069 and said that if elevation 1069 was maintained it would not exceed 116 second-feet passing the east channel and through the reefs shown on Exhibit 13. He was asked what would be the maximum of the water passing over that reef at that elevation and to give his conclusion as to the least amount of water that would be coming down the east channel. He stated that it would be at least 100,—from 100 to 116 at an elevation of 1069 at point marked "Q."

The witness was shown

DEFENDANTS' EXHIBIT "G" FOR IDENTIFICATION

(A photograph) (Tr. 192)

and stated the picture is a panoramic view taken from the west bank of the Rogue River prior to the blasting upon the western side of the river; that it indicated that it was taken September 16, 1928; that it shows quite clearly the localities to which he has been referring in his testimony as the same existed approximately at that date. [182—90]

(Testimony of Floyd W. Allen.)

Counsel offered it in evidence and stated that it did not have any probative value but was the best photograph to show the condition existing prior to the blasting. It was received without objection, and marked Defendants' Exhibit "G" received. (Tr. 193.)

The witness testified that he did not know whether "C–C" is identical with their original survey line which is carried all through all of these maps, but it was approximately the same at this point.

That at the point of the old survey in September, 1926, when they undertook to make the measurements or cross-sections across this identical place the water was so rapid and the water was so deep that they couldn't make the cross-section. They couldn't intelligently make the cross-section at that point.

He testified that the change in the contour of the bed of the river was noticeable immediately after the flood of 1927,—February, 1927, when the highest water of record occurred, being 90,000 second-feet,—that he noticed the change in the following summer of 1927. Asked if from his observation there was any other effect upon the rock structures and islands at or in the immediate vicinity of this location he said there was quite a protruding island immediately,—approximately in the thread of the stream,—in line with N–N on Defendants' Exhibit "E."

The court stated that the witness had already

(Testimony of Floyd W. Allen.)

testified to that, and the witness added: "to which I have already testified."

Mr. Kollock stated he did testify "had been washed away," I had forgotten that. The witness answered "Yes." [183—91]

Defendants' Exhibit "E" for identification was received in evidence. (Tr. 195.)

Plaintiff's Exhibit 13 was then marked as having been received in evidence. (Tr. 195.)

The witness testified that the effective head to which he had previously testified was the head at the point of return of the water at the power plant proper; that the effective head is variable with various stages of the river, ranging from 22.7 at low-water stage, to 21 at 1470 second-feet discharge of the river, rising again to 22.8 when the river stage is,—when the flow of the water is 2500 second-feet, and then diminishing more or less at a uniform rate as the rise of the river from approximately 15 feet lowers the effective head. That the effective head is the difference in head between the surface elevation of tail waters or point of return of the waters to the main stream and the waters immediately adjacent to the power-house, or the waters in the forebay; that if you reduce the effective head it would reduce the efficiency of the plant by practically the same ratio as the loss of head. As to the varying head with reference to the cost of production per kilowatt, he stated they had designed this plant for three different canals. The first one is the complete diversion where the water is raised

(Testimony of Floyd W. Allen.)

to a fixed elevation in the river of 1073.0. That would be the lowest stage at all times; that is where the dam would be built completely across the river.

Objections of immateriality were sustained, and the [184—92] line of questioning abandoned.

The witness stated that in the development of the present plan of operation it had never been his intention to lower the elevation of the river below 1069; that at his recommendation Mr. Muirhead advised him to employ Mr. Brubaker, the aerial photographer to have aerial maps or aerial photographs made that they might be converted into aerial maps. These were made in the fall of 1930.

He produced

DEFENDANTS' EXHIBIT "H."

and stated that it was the resultant of several aerial photographs taken from aeroplanes,—a mosaic at an approximate elevation of 3,000 feet in the air. That it was taken by the Brubaker Aerial Survey while the witness was on the ground. That the picture quite accurately shows all the details there of the existing structures and condition of the ground on the date of the survey in 1930; that it is drawn and enlarged to an accurate scale of one hundred feet to the inch; that it is accurately scaled; was taken September 30, 1930, which was after the blasting was done and prior to the former hearing of this case, which was in October. The witness stated that the place where he placed a red ink mark on the exhibit showed the location of the

(Testimony of Floyd W. Allen.)

proposed diversion dam; that the dotted line appearing down the center of the apparent bed of the stream is an imaginary line for the thread of the stream as previously determined on other maps exhibited in other cases and platted on the photograph by the witness; that the area blocked out on the trapezoid A–prime (A′) is approximately the boundary of the blasted area on the [185—93] west side or west bank of the stream; that he arrived at the determination of that area so blocked out by him from the best evidence on the ground and from hearsay,—from evidence that he could collect from various people; that he didn't make an actual survey of the property himself; that from the best knowledge he could obtain this boundary line includes the area blasted.

The Court admitted the exhibit in evidence on the agreement of counsel simply as a purported bird's-eye view of the locality which the Court would check with other information at hand and having no probative value at the time and marked

DEFENDANTS' EXHIBIT "H." (Tr. 202.)

DEFENDANTS' EXHIBIT "H"

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(Testimony of Floyd W. Allen.)

As to the accuracy of the exhibit as to scale, the witness said that markers were placed every 200 feet along the highway and certain identifications on the river. These are shown on the map. These markers as shown on the map the witness marked with a diamond in blue; stated that white marks were placed along the highway at 200-foot intervals. All of them were not visible on account of the shade from the trees, but a sufficient number were visible to enlarge the photograph to a given scale. The white area shown as "C" is concrete pier placed upon the east shore prior to this photograph and the building marked "D" exists upon the ground both of which are a known distance apart. The enlargement was made to conform both to these previous markers on the highway and the given distance from C to D. As to the known distances between the buildings, the witness stated they are known by reason of the fact that they have this survey and from the previous map and they [186—94] have these from actual survey; that it is irrespective whether it is measured upon the highway or straight through, or around this way, it will figure out the same distance. He stated that he had made a comparison between the photograph as produced and that these spots indicated in an actual survey on the ground. He then took Defendants' Exhibit "I" for Identification,—

DEFENDANTS' EXHIBIT "I" FOR IDENTIFICATION (Tr. 203)

and stated: This is made from a survey in 1926 drawn to scale, 100 feet to the inch, with such subsequent surveys identifying structures that were completed since that date. He stated that he thought the best comparison was to place the tracing immediately over the photograph which the record shows the witness did. The witness was told that in order that the record may be clear he should make a statement explaining that he was now making a comparison between the aerial photograph and the tracing and he answered: "For all practical purposes, it is identical." That it showed two structures to which he had referred as identical. That the map is on a scale of one hundred feet to the inch; that the other map is on a scale of 50 feet to the inch; that he made the tracing in 1928; that the survey was made in 1926 and the photograph was taken in 1930; that he has made a blue-print from this tracing; that it was in evidence in court in 1928; that it was on this same scale; that he did not have it in court. He was asked if the map was based on the original survey made by Mr. White and stated,—"It is a copy of it." That it was the first case in equity that that map was made for. [187—95]

The witness stated that there were two such photographs of the upper regions on the river,

(Testimony of Floyd W. Allen.)

meaning by that extending from the falls to the north line of Section 15. He explained that the falls were up opposite the headgates of the canal. He stated that this mosaic was taken about 1:30. Asked if he meant the photograph from which the mosaic had been made, he answered: Yes, about 1:30 September 29th. That an hour later there was a series of photographs taken from the north line of Lot 15 to approximately the south line of Lots 1 and 8, Section 15. That the flow of the stream was changed between the time the two photographs were taken, as follows:

The splash boards along the temporary diversion dam extending from the southerlymost islands to the concrete headworks near the headgates were partially removed; also that the gates in the concrete diversion dam were opened allowing increased flow of water in the westerly channel of the river and returning back to the main channel through the point of diversion,—or through the temporary wing-dam. He said he had a photograph taken of that changed condition.

The Court admitted as an original exhibit, Defendants' Exhibit "I" for Identification,—Defendants' Exhibit "I" Admitted (Tr. 208)—based upon the fact that the witness had testified that it is accurate to scale from notes of the survey.

The witness was then shown

DEFENDANTS' EXHIBIT "J" FOR IDENTIFICATION (Tr. 208), [188—96]

and stated it is a sectional aerial photograph made for the purpose of showing the increased flow in the westerly channel of the river by reason of opening up the temporary diversion dam extending from the concrete headworks to the southerlymost island. He stated that he meant that it was a mosaic from the aerial photographs,—that there were three of these aerial photographs making up the mosaic,—that the lines thereof could be seen on the exhibit. The Court, by agreement, admitted the Defendants' Exhibit "J" (Tr. 209), under the same conditions as those under which he had originally allowed Exhibit "H" to be introduced.

The witness then testified that Exhibit "J" was on the same scale as "H."

Asked to point out the changes in the river flow he stated the first apparent increase to which he wished to call attention was the water passing through the temporary diversion dam extending from the island to the main land near the headgates. The picture also shows quite an increase in the riffles in the water from the outermost and northerly island to the larger of the islands in the center of the stream; this is the reef extending from the two islands mentioned; that close examination will show a decrease in the white waters in the east channel of the reef extending from the centermost island to the east shore of the river;

(Testimony of Floyd W. Allen.)

that this explanation apparently covers all changes in the photographs.

He stated that the water in the east channel is decreased by 72 second-feet as stated in his previous testimony. This is not shown on the photograph. That the decrease [189—97] of the flow in the river over the reef by the opening of these points below was produced by reducing the head or reducing the water in the still waters or head of the diversion dam to a lower elevation, increasing the head of the water between the main channel above the islands into the still water, allowing a larger volume and higher velocity through these openings known as the narrows which he marked "X" and through the reef marked "Y" upon photograph "J." That this last to which he had referred is the channel in which the water flows from the east to west in a considerable amount over to the west side of the river and the exhibit shows an increase in the flow over the reef in the area marked by the letter "Y"; that this reef which he is talking about is the one which they intend to build up higher and shut off the 330 second-feet from going to the westward; that it is the reef location of which will be included in the location of the permanent wing-dam which they are now constructing.

Mr. Kollock stated that this was entirely different from the reef "C–C."

The witness stated that he believes it is indicated by Engineer Olsen by the letters B–C and can be referred to as that. The witness stated that he

(Testimony of Floyd W. Allen.)

had been able to draw the conclusion that if there was no wing-dam or diversion dam extending from the concrete headworks or gates at the entrance of the canal to the southerly island, the water flowing in the east channel or over the reef would not be much in excess, if any, of 50 second-feet. (Tr. 213.)

At this point, witness was withdrawn to accommodate Mr. Brubaker. [190—98]

TESTIMONY OF WILLIAM C. BRUBAKER, FOR DEFENDANTS.

WILLIAM C. BRUBAKER, called upon behalf of the defendants, testified upon direct examination by Mr. KOLLOCK. (Tr. 214.)

That he was connected with "Brubaker Aerial Survey" not a corporation, but having an assumed name. That it was engaged in aerial photography and surveying. He started that on October 14, 1930, he had made certain aerial photographs of the Rogue River in the vicinity of Gold Hill; that at the time he was with Mr. Muirhead and Mr. Allen; that Mr. Muirhead is the vice-president of the defendant cement company and Mr. Allen the engineer. Referring to Defendants' Exhibit "H" and "I" he stated that they took "H" first. The exhibits are mosaics built up from photographs taken at the time,—taken just a few seconds apart, that they flew across in a southerly direction to an elevation of about 3,000 feet and took the first series of pictures about 10 seconds apart, and then went on over into the mountains to photograph the

(Testimony of William C. Brubaker.)

quarry over there and to wait awhile until some changes were made in the river; that they came back in about forty or forty-five minutes and followed across the same way again and made another series of photographs; these being in mosaic Exhibit "J."

Asked how many photographs were present in the mosaic exhibit introduced as Exhibit "H" he stated "the upper one has about five pictures in it and the lower one about three I believe." That he was flying at a velocity of about 90 miles per hour; that he had been working in the business for about 9 years and had done work for the Geological Survey and many big companies; mapped the upper Columbia [191—99] River for the Government.

He stated that the Geological Survey built up very accurate maps from these photographs and that he had platted maps by using certain ground controls, working with the engineers on the ground that have went into various courts; the Federal Court at Tacoma,—and he has a letter from the Geological Survey that photographs made of the upper Columbia River were very good; that certain measurements must be made on the ground so they can make these photographs to that scale.

They told him that there were certain marks put upon the ground for measurement and these were made up and he used the ground controls; that if definite survey stations are marked on the ground at a definite distance apart, he would consider mosaics so made up practically accurate; a certain percentage,—probably one per cent error is what they allow in contracts on a map of that kind; that

(Testimony of William C. Brubaker.)

there were five photographs in Exhibit "H" and three in the lower one; that it is usual to fly a great deal higher than they flew in this instance, in which case they don't have to shoot so many pictures; that they could cover all of this in one picture if taken from an elevation of 10,000 feet; that in a real rough country they usually fly ten thousand feet high or higher, but here they wanted to show the water conditions very plainly so they flew low; that this may give a little error up the side of a hill or down in the river bottom but are very close. In mapping rough mountains you have to go a great deal higher than 3,000 feet; that he had checked the levels,—they are on the camera. We keep them as level as possible so we can see when we snap the picture, then we change it to the ground control in the studio,—we take the negative and bring it to the scale [192—100] of this ground control,—the camera is tipped a little and tipped back again to make the prints; that crabbing does not make a distortion in the photographs,—it just twists the picture around,—it is the hills,—lying up close to the hills and not having the picture level that throws them out of scale,—crabbing just screws them around a little,—doesn't make any difference in the mosaic.

That in order to get an absolute accurate survey, you have to check with the ground maps; that in some methods and some equipments they claim to make an accurate map. The Government makes them with only three control points in 10 miles,—that is all we did on the upper Columbia River.

(Testimony of William C. Brubaker.)

We made the pictures and they built the mosaics themselves. Their method there was three control points,—a triangle,—they carry it for ten miles and put contours on as close as two feet,—and Boulder Dam,—I didn't do it, but the Government done it and they claim closer than what they could do on the ground.

Asked if he would testify that H is that close,—answered "I would not say that,—just exactly how accurate that is,—it is built from ground control." Asked if it was the same way with "J", he answered,—both the same. They principally show the details in between these ground controls.

TESTIMONY OF FLOYD W. ALLEN, FOR DEFENDANTS (RECALLED).

FLOYD W. ALLEN, recalled, direct examination continued by Mr. KOLLOCK.

He said that Exhibits "H" and "J" were on the same scale. There is not as much in "J." Asked if he had a definite plan for automatic control for the cement company he answered there [193—101] has been a plan for automatic control from the very inception; that the control is,—to start with, the turbines themselves, the quantity of water flowing through them, is controlled by the demand for power. The gates of the turbine are opened and closed automatically with the demand for power, by the load upon these turbines. The size of the turbines governs the maximum quantity which may be drawn through these gates, together with such regu-

(Testimony of Floyd W. Allen.)

lations as you want to set the gates at to permit the maximum volume of water to pass through. It is quite feasible and possible to regulate the governors not only to control the quantity of water, but also regulate the momentum within certain limits. Other features of regulation are remote control which will be at,—the point of control will be the cement mill itself, but the automatic features,—all the automatic features that are known practical are adopted in this plan. (Tr. 220–1.)

Asked if it was entirely feasible and possible from an engineering point of view to set the governors so as to regulate the elevation of the water or head, he answered that in this particular instance the elevation of the water will be regulated by total flume or draft through it; there may be a slight drawdown at your forebay, but it would not be effective upon it as far upstream as the point of diversion or above the uppermost wing-dam, because the slight increase in draft with very normal use would be comparatively momentarily due to starting loads and would not be a sustained condition. That their pondage is entirely limited to the canal itself and what little water in the flume and forebay, it is not feasible,—practical,—to expect or depend upon any pondage above the headgates because there is construction there which automatically reduces the head at this point so the loss [194—102] of the head through these headgates is taken into account. That there is no pondage above the headgates.

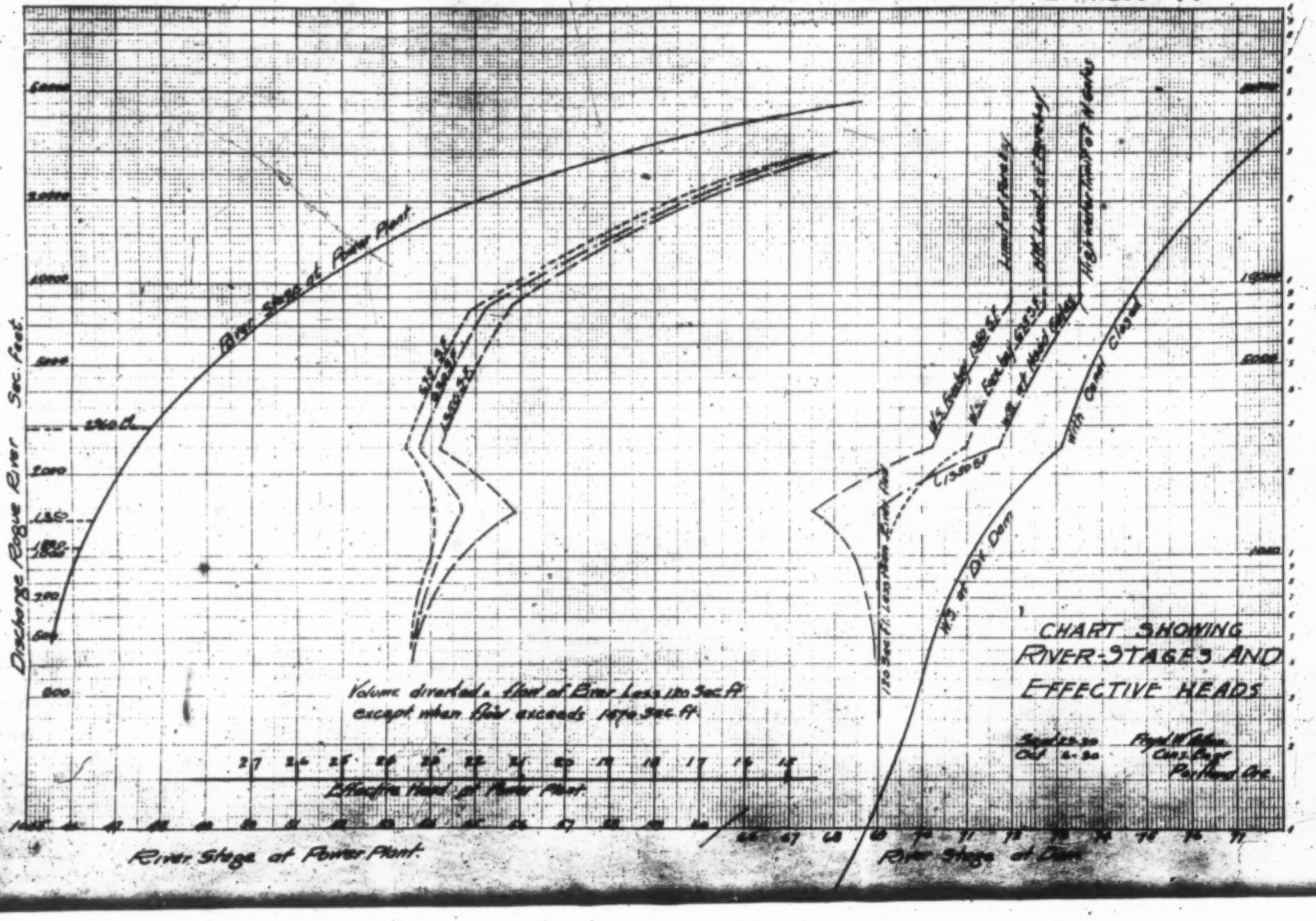
(Testimony of Floyd W. Allen.)

The second thing that controls the matter is the capacity of the canal and flume itself at certain stages of diversion; the flume particularly is regulated or designed that it has practically the capacity at the various heads for which the plant is designed.

Asked if it was entirely feasible to so construct and regulate the plant that the elevation of the water at the point of diversion would not be reduced below 1069 irrespective of the demand of the load he said the head can be maintained at all times as such regulations required and it has always been his intention to have it so maintained; that this is practically a stream-flow plant, meaning that it is based upon the normal low water of the stream with such raise as is practicable to divert without any pondage; that he had not prepared any further maps in connection with the matter which he wished to introduce. (Tr. 222.)

DEFENDANTS' EXHIBIT "K" FOR IDENTIFICATION.

DEFENDANTS' EXHIBIT "K"



(Testimony of Floyd W. Allen.)

The witness stated that it is a copy of a rating,—curve showing effective head that can be produced at the power plant under different stages of the river to which he had before testified in general and that upon the graph which he had prepared the effective head was limited between 23½ to 15 feet.

Mr. Kollock offered the exhibit as simply showing the graph, and it was received without objection as Defendants' Exhibit "K." (Tr. 223.) [195—103]

The witness was then shown

DEFENDANTS' EXHIBIT "L" FOR IDENTIFICATION. (Tr. 223.)

DEFENDANTS' EXHIBIT "L"

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SEMI-LOGARITHMIC NO. 5118

River Discharge

Spoon Hair

Light Load

Heavy Load

2 Units Total Cap 2085 KW

Kilowatts Delivered to Plant

CHART SHOWING
ELECTRICAL POWER
Kilowatts delivered
to
Bearer Portland Cement Co

Oct 8-1930 Floyd M Brown
Portland Ore

(Testimony of Floyd W. Allen.)

and stated that it is the resultant of the power that can be delivered with all losses considered, at the cement mill under the various stages of the river, shown in four lines, representing a 300 kilowatt unit; one 1050 kilowatt unit; one 1050 kilowatt unit plus 300 kilowatt unit, and total of two units of 2045 kilowatts.

He stated that these were units that they proposed to install, this being a graph representing graphically his former testimony upon the subject.

It was received without objection as Defendants' Exhibit "L." (Tr. 223.)

The witness was shown defendants' exhibit,—

DEFENDANTS' EXHIBIT "M" FOR IDENTIFICATION. (Tr. 223.)

and stated that it is a platted discharge by months from the year 1906 to the year 1925, inclusive, showing average monthly discharge of Rogue River during this period of time; that this data was compiled from U. S. Coast and Geological Survey stream flow records compiled by himself from original records and printed records of the geological survey.

He stated that these stream flows are based upon the Gold Ray station, 4 miles above the point in question; that he was familiar with the river between the point [196—104] in question and the Gold Ray plant; that there was only one diversion point betwen the two,—that was Gold Hill Irrigation (meaning district) of 25 second-feet; that at times there was quite a large flow of water coming

(Testimony of Floyd W. Allen.)

in between the two points from Sam Creek and tributaries. That all calculations as to power have taken into account the diversion of the Gold Hill Irrigation District.

He said that he had not taken into consideration the flow from Sams Creek.

The Court admitted in evidence Defendants' Exhibit "M." (Tr. 225.)

Cross-examination by Mr. REAMES. (Tr. 226.)

Witness was shown Exhibit "M" and asked why the figures were not extended beyond the year 1925 and he stated that it was made in 1926.

His attention was called to his testimony as to stream flow measurements made in September, 1930, on September 26, 27 and 28, 1930, and as to whether the flow of the stream on each of these dates was large.

He answered that the average flow per day at Gold Hill was less than the figures he had presented to the court; that the flow on these different dates was not entirely uniform.

His attention was called to the fact that he had testified that he had compensated for that, which he said was correct. He was asked if he had any rating curve [197—105] extending over a long period of time or anything from which to base that compensation and answered no, that he had daily notes of the rating curve from individual section measured but that he didn't have any records of these sections at any other time, but he could make

(Testimony of Floyd W. Allen.)

a reasonable compensation for that correction which he did, which was not shown in his testimony; not absolutely a perfect compensation,—that it doesn't close exactly,—that in other words so far as he knew no one had ever taken the ratings at any other time at these places. He answered, not to his knowledge. He was asked if he tried to adjust the difference betwen the stream flow of the 26th with what it might have been on the 28th just by guessing at it.

He answered,—well no, it wasn't a guess by any means, because it was based on the highest velocity the surface area and the difference in the height of the stream at that particular point, but he stated that he hadn't taken the velocity but the one time.

His attention was called to blue-print "F," introduced as Defendants' Exhibit "F," on which there were shown certain broken lines and certain straight lines. He was asked to state why they were indicated differently,—for instance at elevation "B," that this is a broken line.

He answered the first portion in the cross-section extends from an island more or less in a northeasterly direction, and extends on up to a small island in the center of the stream which terminates there at 30 feet from the island; that they again started in at a point 22 feet from the island,—not the same point,—and cross-sectioned in an easterly direction across the shoals into the main line of this channel. He stated the reason for [198—106] that is that a part of the first portion sectioned from station .00 to 30 is shown in solid line to keep from being con-

(Testimony of Floyd W. Allen.)

fused with that part extending past the continuous cross-section across the river; that they backed up to station 22 and from station 22 to the east channel is all shown in dotted lines so it would not be confused with that small portion extending from station 22 to the line in the center portion. The distances are indicated at 10 foot intervals; that he made the survey on September 28, 1930.

He was asked to produce the notes of the survey. He stated that his notes were put on a loose-leaf book.

He was asked whether or not at the former trial of this case he had testified concerning these elevations of that reef on the east side. He stated that he did. Asked if he gave those elevations at 66,—66.4,—the bedrock elevations which he had indicated on this blue-print, he answered that he was not sure of it, but had a recollection of some testimony to that effect.

He was asked if he remembered that what was Exhibit 10 on the first trial was Exhibit "6" here; that his folder containing the filings in the State Engineer's office contained all of the sheets upon which Mr. Muirhead had been examined at the former trial showing the elevation,—the lowest elevation on the reef, which is plaintiff's "C–C" to be 68 feet,—whether he remembered that was identified in the former case and that,—

Here Mr. Kollock objected to the line of examination as not being proper and the Court ruled that it was cross-examination.

(Testimony of Floyd W. Allen.)

The witness stated I do not recall testifying to that. [199—107] He was asked if he recalled that if was identified by Mr. Muirhead before this witness went on the stand in the first trial of this case and answered yet; that he believed all the maps were identified by Mr. Muirhead at the trial, including that one. He said that he really did not know whether all of the maps in that Exhibit 10 were identified by him at the former trial.

The following questions and answers were then given: (Tr. 229.)

Q. Did you testify at that other trial with reference to having made, taking these readings of all the elevations at the reef, that you were showing on this exhibit?

A. I have testified in court, in that previous case, to making an examination of that, I am quite sure. In other words, it is entirely memory now, but I am quite sure.

Q. Isn't this trial the first time that that evidence has been given?

A. This is the first time that that profile has been submitted in evidence.

Q. And also that the readings on there, for the reef, have been testified to?

A. No, I have testified to that reef before.

Q. In the last trial, before *June* Bean?

A. In the last trial, yes.

Q. Will you look at that transcript of testimony between now and our coming into court to-morrow morning, and refresh your memory?

(Testimony of Floyd W. Allen.)

Mr. KOLLOCK.—Isn't it the proper procedure for counsel to point out to this witness what he testified to?

COURT.—Never mind; he has asked him to do something. He has the record, and can verify it. [200—108]

The witness was then asked what he meant by effective head and he testified, effective head is the head produced between the forebay and the tail waters at the power plant; in other words, it is the waters at the entrance to the power plant and the tail waters of the power plant,—the difference in elevation of the waters at the power plant, of the tail waters; that in this plant they would vary considerably ranging from maximum height in the forebay waters, will not exceed,—the maximum height of the forebay waters will not exceed 73. He testified that the maximum elevation of the water in the forebay is 72 at 1350 second-feet diversion and the tail waters will range from elevation 1045.5 at extreme low water,—1045.7 to,—well, the maximum elevation has reached the elevation of 68 at flood stage; that the forebay is immediately adjacent to the power-house within an area of 50 feet,—a limited distance of 50 feet. That the variation there is minimum of 67.5 to maximum elevation of 72, water surface.

His attention was called that he had testified to the cost per kilowatt being increased as the water elevation was drawn below 69. He was asked to enumerate briefly what these costs would amount to,—of what they consisted and how much per kilowatt the total addition of these things would be.

(Testimony of Floyd W. Allen.)

He stated he was basing that entirely upon the cost of the three plants as previously designed by arranging different heads. He began to explain what the first plan of development called for and his attention was called to the fact that he had said it was not practical or economical to go below 1069. That he had explained that by saying it made certain changes necessary,— [201—109] some in the canal, —and that this would increase the kilowatt cost. He was asked what these changes were and the cost thereof. He stated that he didn't have the detail of the increased cost below 69 elevation. Asked to give it comparatively he stated it would practically for all practical purposes increase from five to fifteen per cent. The amount in money would be $10,000 to $30,000 for the entire installation; that he had no figures but was just estimating that. That the biggest item of cost would be the additional area required in the headgates at the upper end of the diversion canal; the depth of a foot over and above the depth already planned which is all in solid rock at that depth; the lowering of the floor level of the flume and still maintaining the wall heights of the flume and the increase in the cost of the type of turbine that would be required for a lower head with larger flow; also increase in cost of generator due to the fact that the lower head reduces the speed of the generator. (Tr. 233.) [202—110]

(Testimony of Floyd W. Allen.)

FLOYD W. ALLEN, witness for the defendants, whose foregoing testimony was taken on Wednesday, April 29th, resumed the stand, in cross-examination, on Thursday, April 30th, 1931.

(Questions by Mr. REAMES.)

The witness was asked and answered:

Mr. Allen, speaking of the measurements which you say you made on our reef on the east side, corresponding to C–C on this Exhibit 2, on September 28, 1930, I will call your attention to the fact that the trial of this case before Judge Bean, of this same case, began on October 14, 1930. I asked you yesterday if you testified at that trial to having made these measurements of the elevations of the bedrock just above that reef. Did you at that time testify concerning that?

A. I looked over the testimony. I find I did not testify as to the depth of the bedrock; I did testify, however, to the water flowing over that reef, by actual measurement. In other words, I had calculations based upon those depths, which were given at that trial.

Q. Those depths were not mentioned?

A. The depths were not mentioned in my testimony.

Q. Now at that trial there was an exhibit, No. 10, Plaintiff's Exhibit 10, which has become Plaintiffs' Exhibit 6 here and as a part of that there was this sheet, which is marked Sheet No. 2, which shows the elevation of that reef to be what? [203—111]

(Testimony of Floyd W. Allen.)

A. The elevation of the reef is shown at approximately 68.2 elevation.

Q. And the case before His Honor Judge Bean was tried out, was it not, upon the basis that this indicated on your map as the lowest point on that reef of that bedrock elevation there 68.2?

A. None of my testimony referred to that, or none of my calculations referred to that particular cross-section there.

Q. Before you had gone on the stand this had been introduced, had it not?

A. I think it had, yes.

Mr. KOLLOCK.—That was plaintiff's exhibit, was it not?

Q. Plaintiff's Exhibit 10, in that trial, and is now 6 here. And you now testify that preceding that trial you had, on the 28th day of September of that same year, made these soundings and these measurements, and determined the bedrock elevations that you gave here in your testimony the other day, going down as low as 66.2 or 66.4? Exhibit "F" will show that. You now say that you found on September 28, 1930, that elevation to be what, the lowest elevation? A. 66.0.

Q. 66 flat, and several other readings; how many others have you noted?

A. I mentioned two there, three other low points.

Q. What were they?

A. One is 66.4, another one 66.2. (Tr. 234–5.)

Asked if these soundings at that point are now shown on Plaintiff's Exhibit 13, he answered that

(Testimony of Floyd W. Allen.)

all soundings that he took across the stream are not indicated on the map, but the main [204—112] of them are shown in red line, extending from X to Y.

He testified that his testimony with reference to this exhibit was not based upon any map that he produced, or any blue-print of this map, stating that he used plaintiff's map because he had planned the same exhibit himself.

He testified that on the 10th day of April, 1931, he obtained from the State Engineer's office, Plaintiff's Exhibit 7 for Identification, which is Defendants' Exhibit "B."

At this point Mr. Kollock, for the defendants, stated that the exhibit had not been received in evidence.

The witness was asked if, when Mr. Muirhead had been upon the stand, and when Mr. Muirhead's attention had been called to the new filings, and they were mentioned, and the demand was made by the plaintiff to have the same produced, that this witness had caused the Defendants' Exhibit "B" to be handed to the plaintiff's attorney, and he answered "Yes." He stated that he had not included in the certified copy of these records any sheet corresponding to Plaintiff's Exhibit 13, which shows these readings at the reef, to which the witness' attention had just been called. He was asked if he had this certified copy made up by the State Engineer on the 10th day of April, why did he not include in that a copy of this sheet, Plaintiff's Exhibit 13, which does contain these readings, and which the witness had

(Testimony of Floyd W. Allen.)

said was made just prior to the last trial. The witness answered that there is another set of copies exhibited here which is a separate attachment which was filed on the date that he made his trip to Salem (April 10th). That these copies of filings were prepared prior to the previous case, or prior to any former case.

The second exhibit contains the supplemental sheets [205—113] which were filed on April 8th, 1931, in the State Engineer's office. They were brought here for exhibit.

The witness was asked if it was not a fact that when plaintiff's attorney was asking for these filings that were made after the case had first been tried, that the witness had produced the one that did not show these elevations which he now claims he had taken on the 28th of September, 1930? He said: "I don't know as it does."

He was asked to state the date he filed Plaintiff's Exhibit 13 with the State Engineer and answered it was April 8th.

He was asked then why he did not include the same in the exhibits so certified to on April 10th. He stated that he did; that there is the certification of the copy, this certified copy, that it just happens not to be in the same enclosure. The witness was then asked to take Plaintiff's Exhibit 7, the profile with reference to the measurements of the reef on the east side and look at the same closely, and see whether or not it contains marks above the cross-section marks there, and what they are. He

(Testimony of Floyd W. Allen.)

answered: "There is a light dotted line extending 57 feet of this total 60 feet, the light dotted line—I mean the line shown above the heavy dotted line is the elevation of the river bottom at the different locations extending from a point 22 feet from the island northerly."

Asked if this little faint line was erased before the blue-print was made, he answered "No." He was shown the tracing and answered: This tracing from which this blue-print was made—that is the tracing from which this blue-print was made, and that line is quite faint on the tracing. That is not a controlling factor, and had nothing to do with the—

He was interrupted and asked: If you take any one [206—114] of these that does show up reasonably plain with these circles, what does that indicate if it does not indicate higher elevations? And answered: From a distance twenty-two feet from the island to a point 57 feet, is elevation from the stream bed from a small island approximately the center way from the larger island to the east mainland, upstream a distance of 35 feet. That he was endeavoring to see if there was any flow from the westerly side of this small group of islands, to the easterly side. He started directly from a point 22 feet from the islands and went directly to the east shore of the river so what appears on that profile has no bearing on the marks or low elevation between the island and the east shore.

The tracing produced by the witness was marked Exhibit 19 for Identification (Tr. 239).

(Testimony of Floyd W. Allen.)

The Court requested the Plaintiff's Exhibit 1 for Identification, which now contains the explanation of the witness of this tracing in red, marked in some such way that these marks placed thereon could be identified.

The COURT.—Place red marks on Plaintiff's Exhibit 1 for Identification, extending from 22 to where?

A. "L" to "M" as indicated on the profile, Exhibit "F," in red. From "M" to "O" is likewise indicated in red on "F," that being faint line upon the profile. Line "M" to "P" was marked on Exhibit "F" as terminating at "P," that being the dotted line from "M" to "P."

"COURT.—You have also indicated the line upon which these measurements, shown on the profile, Defendants' Exhibit 'F,' on Plaintiff's Exhibit 1 for Identification, being the same letter identification marks?

A. Correct." (Tr. 239-40.) [207—115]

The witness stated that the operation of the electric plant, the amount of water drawn into the turbines depended upon the amount of load used at the cement mill. And that that load pulled at the cement mill automatically caused the wheels and turbines to receive the quantity of water, which at the head would make that much power. He stated that the plan was to maintain a water surface elevation of 1069 at the point, upper end of the diversion dam; upstream end of diversion dam, which is possibly a thousand feet above the contemplated headgates at the beginning of the canal. (Tr. 240.)

(Testimony of Floyd W. Allen.)

His attention was called to the fact that heretofore he had used the expression of maintaing the surface elevation at 69 at the headgates, and whether there was any difference between the two places, and stated: There will be a slight difference not to exceed one or two tenths of a foot. He said that notwithstanding the varying amount of power being taken at the cement mill, the surface water elevation of 69 at the point mentioned would not vary more than—the lowest point would not exceed probably 69.1, but that he had allowed the lowest point at 69.0. This is at approximately 1,000 feet above the headgates. That it is opposite and about fifty feet above the shattered area, that is up stream from the shattered area.

Asked for his plan for maintaining uniform elevation at this point with a varying load at the cement mill, he answered that the load is not so variable at the cement mill; that in other words, the cement mill has quite a constant load with the exception of starting loads, which throw a momentary load on the current; that starting load is of short duration, and the slight pondage which you would have in the flume and forebay and in the canal itself, is sufficient to regulate the starting condition. [208—116]

He was asked how much power he planned to make and keep the surface elevation standing at 69, and said: That they were not able to make any more power than the stream flow would permit at that time. That is a variable power. In other

(Testimony of Floyd W. Allen.)

words, they could generate a variable power quantity. That with a flow of 700 second-feet, they would be able to generate only 900 kilowatts delivered at the plant, although the demand would be very much greater. He was asked what there was to prevent the plant from drawing on the pondage above the headgates and answered: At that stage it would be limited to one unit of the river, meaning one unit of the two. That it was planned to build two units of a thousand kilowatts each. He was asked: Supposing that they were using both units, and they had only that amount of water in the river, and they had a power demand for fourteen or fifteen hundred kilowatts, how would they keep the cement plant from drawing the extra water out of the pondage that was above? And answered: That they could not operate any fourteen hundred kilowatts when the river—unless the quantity of water passed by 120 second-feet that he had testified to before, would not develop fourteen hundred kilowatts. It would only develop nine hundred kilowatts to start with.

He was asked if he could not, for an hour, or perhaps two hours, be drawing on pondage and make more power. He answered: "Yes," it would be possible to a limited extent. That would be only an additional 120 second-feet. That would be again governed by three factors. In other words, the opening of the headgates, at the entrance of the canal, the capacity of the canal itself, which is diminished at the lower flow of the river, and the

(Testimony of Floyd W. Allen.)

diminished capacity of the flume itself at the lower stage.

He was asked to assume that they had 1347 second [209—117] feet, whether then the canal was big enough to utilize it. He stated that the plant was big enough to take 1347 second-feet. Asked if his canal and plant was not big enough to take 1347 second-feet, he answered: "At a stage of the river when it will rise to that."

He was then asked that with 700 second-feet in the river with this plant in operation, and the amount of water used controlled by the demand for power in the cement mill, what there is to prevent the cement company from drawing off the pondage from Lots 1 and 2 from behind reef C–C, shown on Plaintiff's Exhibit 2, and answered: "In that particular case, when the river is low, the only thing to prevent us would be we could shut down one of the two units."

Asked if that would be practical in ordinary operation, or whether the company would not take the power that was available, if it needed it to operate the two units, he said: "In the study of the cement industry and its relation to this power, we have determined that we do not need that power during that low flow of the river." He was asked if it was not a fact that the best market for the cement, when the most of it should be made is during the low flow of the river, instead of the high flow of the river, and said: That the demand for the sale of cement is in the summer months, but the raw end

(Testimony of Floyd W. Allen.)

and the burning end occurs, and should occur six months prior to the sale of the cement. Asked to tell the Court what months had the cement plant been operated in the last preceding years, he answered: That he was not an operator of a cement mill; that it has been the practice in the past that the heaviest operation has been through the summer months; that this has been due to many other conditions entering into it, that is, the quarry and the economy of daylight and those conditions enter into it rather than the [210—118] power. He was asked if this would change any when they had their new plant. He answered: That the daylight would be the same and the demand for cement would be the same, but the cement mills can adjust themselves to the power available to their advantage very readily. He was asked what would be the object of the cement plant with a possible load of twelve hundred or thirteen hundred kilowatts that might be used at the mill, what would be the reason for using only one load and not drawing the water from the plaintiff's side of the river? He answered: That the 120 second-feet which they had estimated and figured would be the total passing over when they were maintaining 1068 elevation at the point of diversion, is not sufficient additional power to make up the deficiency which would be required to carry the mill to full capacity.

Asked if there were 120 second-feet behind plaintiff's reef (C–C), and the cement company were operating its plant and needed the water, would not its plant automatically take it? He answered:

(Testimony of Floyd W. Allen.)

No, that there were too many constrictions in the canal and headgate at that stage of the river, with forebay and canal lowered. That he had figures as low as 700 second-feet, it had never really been that low. He was asked referring to Exhibit "K," if it was not true that the Geological Survey Records showed the water stage from 500 second-feet stage up? He answered: If the river has ever been that low, he failed to find note of it in any records he had seen. That up to the summer of 1925, the lowest record was 770. Since that date it had been down once to 748 in July, 1930.

He was asked to state what there was in the construction of the works, including the canal, that would keep the cement plant, with a demand for fifteen hundred kilowatts and a flow in the [211—119] river of 700 second-feet, from drawing that pondage off of Lots 1 and 2, and answered: If we have a demand for fifteen hundred kilowatts at the cement mill, and only 700 second-feet in the river, we could not generate it. He was asked if they could not draw off what water there was above or behind where he was to maintain the elevation of 69.1 and answered: That it would only last about ten minutes; would not last very long, did not know exactly how long it would. He said it would not be practical to do it. He was asked whether in the operation of the plant, when the power would be drawn down at the cement mill, it would automatically draw the pondage off of plaintiff's land? And answered: No, not necessarily (referring to Plaintiff's Exhibit 7, Defendant's Exhibit "B")

(Testimony of Floyd W. Allen.)

because the bottom of the canal would be at an elevation of 1064 at Station 19 plus 50. This is at the entrance to the flume nineteen hundred feet south from the headgates. The approximate elevation of the bottom of the canal would be 1063.5. The flume at this elevation will have an elevation at the above of 1061, and will be approximately one-tenth lower at the power-house, or 1060.9. He was reminded that he was explaining why it was not practical to draw into the turbines more water, and answered: When the water is at an elevation of 1069, the forebay is approximately one foot less, the forebay being immediately above the power-house and below the flume. The water in the forebay will rise. The water in the forebay at 700 second-feet of flow in the river, the water in the forebay will be 1068.7. That will limit the cross-section area of the flume to a capacity, or practically the limit of 700 second-feet, less the 120 second-feet. He said he meant 770 second-feet less 120, which would be 650 second-feet. [212—120]

His attention was called to the fact that there would be no obstruction if the shattered area were taken out. There would be no obstruction above the headgates of the canal to interfere with the drawing down of the pondage through the canal into the power plant. And answered: That there would be no obstruction above the headgates. He was then asked whether that as far as the practical operation of the plant is concerned, when the demand is made at the cement mill for a large amount of power, would it not immediately and automati-

(Testimony of Floyd W. Allen.)

cally demand more water, and draw it from the pondage above the gates in through the canal? And he answered: If two machines were operating. He was asked if they were not going to have the two machines there, and he answered they would both be there. He was then asked if they were both there to operate, would the operation not draw this pondage from Lot 1, and around the wing-dam and down through the shattered area and into the canal? And answered: Would automatically shut one down, that they did not necessarily have to operate it. He was asked whether it would be a practical operation of the cement mill, when the water was available and needed, to shut one machine down. He answered: "Not when you need the power but according to the power we can generate."

He was asked if they then left the other unit in, could not they generate the additional power that they wanted, and whether this would not be done in the practical operation of the plant, and stated: That he thought it would be very impractical to expect to increase the power, manufacture power for a very short period of operation, which would only be an aggravation to the mill. In other words, an increase of power for a period of an hour or so would not do any good to the mill. Asked why then [213—121] they had the two units, he said: To be able to generate the maximum power during the season of the year that they need it, when they can generate it. He said that the power varied through the day slightly, but not very much. That the cement mill is not a very fluctuating load.

(Testimony of Floyd W. Allen.)

Nearly all the machinery is under constant load, except where the fine grinding comes in. If they are only grinding eight hours a day, then there is an increased load during that period. He stated that it would be physically possible with a plant constructed as contemplated, to operate at a surface elevation at a point below 69. (Tr. 250.)

He stated that to get the maximum amount of power, the canal would have to be deepened over and above what is contemplated, the headgates would have to be enlarged and the flume would have to be enlarged. He was reminded that he had been asked about the maximum amount of power, and whether it was practical—whether it would be physically possible without changing the canal, etc., to operate at a lower water surface than 69. And answered: But there are a great many complications that enter into that question. That he could not answer it offhand he did not believe. He was then asked: Is it physically possible to operate at 67? And answered: If the plant is designed for such, yes, but as it is, no; because the stages of the river would be the one controlling factor, with the designs as they are that would prevent—and the size of the canal and the size of the flume and the entrance to the turbines themselves.

Asked at what stages of the river he thought the water would have to be to permit operation at a water surface elevation of 67 at this point where it is claimed that they are to maintain an elevation of 69, he said: Well, the stream flow itself has never

reached as low an elevation as 67. With the diversion completed or partially completed, as proposed, it would be practically impossible to [214—122] withdraw it at any such elevation.

Asked what would keep the cement mill, with the demand for power, with two units hooked up, from drawing down to 67, he answered: Capacity of the headgates, capacity of the canal, capacity of the flume, and entrance to the flume, and entrance to the turbines themselves, are all factors in controlling the water that may be drawn. He said that he maintained that to divert 700 second-feet, the canal would have to be deepened.

He was then asked that, assuming that they were operating the two units and at a flow of 770 second-feet, and at a surface elevation of 69, and the cement mill pulled a heavier load, would not that pull down the surface water elevation? He answered: That it would pull it down momentarily if you have to maintain that load. Asked if it would not keep on pulling it down, he answered: No, because the canal and flume are limited in cross-section area, as you reduce the height you reduce the maximum area. In other words, you reduce the water in the height of the flume by two feet, you decrease the cross-section area and in terms of engineering, your hydraulic radius increases, and you increase the water that may flow down the canal and flume. That if you were operating with 770 second-feet and more power was used, it would not draw down the surface elevation below 69. Not materially.

(Testimony of Floyd W. Allen.)

He was asked what is to keep the other water from the pondage above from being drawn down, and answered: It would just be a matter of filling the canal up, and this drawn down momentarily but would not be of any duration, and would not affect the water surface above the point of diversion materially at all. [215—123]

He stated that after the shattered area were removed, there would be no obstruction between the gates at the head of the canal and the upper river. That the water there would be just the same as any other water; that it would seek its level. He was asked then, if you had a large demand drawing more water into the turbines, is that going to pull on this water the same as it would on any other water? And answered: That it would, and there is also water going down the river all the time to replace that which is taken out.

He was asked: But according to the demand at the cement plant are they going to draw down below 69 at that point? And answered: No, not materially. It was suggested to the witness that in their answer that this blasting was done in order to take all of the 1347 second-feet available. And that in his former testimony in this case, before Judge Bean, if he had not answered that they intended to take all of the 1347 second-feet that could be made available? And answered: Yes. He stated that Judge Bean had asked him about the construction of the plant, and if, when it was constructed it was to take that much water, and that he had answered affirmatively. He was asked if

(Testimony of Floyd W. Allen.)

he now said that a plant with said capacity for drawing the water through there and the water in what might be called the forebay, back of the canal, clear on up the river, that it would not have the capacity to draw the amount of 1347? And said: I do say that. He explained his answer by saying: In my previous statement I made the statement that the canal was designed to carry 1347 second-feet when the stages of the river were at 1477 second-feet, allowing 120 second-feet to pass down the east channel, that that is the total.

He stated that in the natural condition of the river, as [216—124] prevails upon the east, there is 120 second-feet going down that channel. That if they maintain an elevation of 1069, it would still leave 120 second-feet passing down the channel.

The following occurred:

A. Let me take any cross-section here.

COURT.—Referring to what?

A. Sheet No. 4, Plaintiff's Exhibit 7, our Exhibit "B." Taking typical cross-section six plus 00, on Sheet No. 4, and produce the water surface that would exist on river stages—when the diversion would cause a river stage at point of diversion of 1069, as all shown in red now.

Q. You meant that up the river at the point you mentioned before?

A. Up the river. If a river stage that would create an elevation in the canal, would be less head in the headgates of .55 flowing at 1350 second-feet, which would produce surface water in the canal at

(Testimony of Floyd W. Allen.)

this station of approximately 1068.45. If the canal was drawn below 1067—is that what you want?

A. 1068.

A. If the river stage is 1068 in the river, would be approximately 1067.5 in the canal, which would be a loss of sixty square feet of cross-sectional area, and a material increase of the ratio of perimeter of wetted area to the total sectional area, which would decrease the flow of the canal. That same logic holds good in the flume as well.

Q. Then what you are trying to illustrate is that although your canal is constructed to take the 1347 second-feet, when the river is down to stage of 700 second-feet, you couldn't [217—125] draw a couple of hundred more second-feet from the pondage above there, and put through the canal?

A. No. As a matter of fact, every point and every stage of the river, I have not calculated the exact amount.

He was asked if he had a canal that would take 1347 second-feet, and he was operating with the river stage at 700 feet, and desired to draw 500 feet more, could he put this 1200 second-feet through the canal? He answered: They have lost the effective head which is created at the headgates, which would permit the increase of the volume of water through the canal. He stated that if you reduce the headwater at the stream—at the point of diversion you automatically reduced the head.

He was asked if when the pondage was drawn down, suppose more water is drawn, whether it comes from the pond or from a cloudburst, or else-

(Testimony of Floyd W. Allen.)

where, and answered: It would go through the canal. Asked if it would make just as much water if the 1347 feet were coming through the natural flow? He stated that the canal has not a capacity of 1347 second-feet when the natural flow of the river is only 700 because the effective head is not that great. In other words, the cross-sectional area of the canal and flume is based upon the required area that would be given; when the river stage is 1347 second-feet, it is approximately one foot higher than 1069, or an elevation of 1070.

He was asked if he had 700 second-feet and somebody turned some more water in, making 1347 second-feet, would the canal carry it, and answered: Yes. Asked if he had the same additional water, and it came from pondage, would the canal carry it? He answered: When the river is only at 700, the river stage—the river stage at this point without any draft would be 1069, and with the flume and all the gates closed, would be approximately 1070.5. That is, with the canal closed and diversion as we planned. [218—126]

Asked if he was trying to hang it on to some changes to be made by the use of the gates to control the amount of water that entered the canal, he answered: No, that he was not hanging it on to the use of the gates, except that the construction itself has reduced the head by a certain amount under given conditions from the waters above the headgates to a point in the canal itself; there is the loss of head there which is absolutely fixed. Asked if in the operation of the plant he intended to fluctuate

(Testimony of Floyd W. Allen.)

the surface elevation from 69.1, he answered: "Very slightly."

He was then asked what there was to keep the water from being drawn down if they were using more power? He stated: Starting at the wheels and the total opening of the gates att he turbine, your limits of your flume gates leading to power plant limit your canal.

Asked if he was going to keep somebody at the headgates to regulate them? He answered: No, because the fluctuation of the river is not rapid. Asked if it was not true that the only way he could keep the surface elevation at 69 and keep the flow in the river constant, was to keep the demand for power at the cement mill plant constant he answered: That that would help the situation materially. Asked if that were not the only way he said: No, that he would not say that was the only method because you could absolutely control the amount of water that would go through the turbines by shutting down the governor to a point where a certain amount of water would enter its wheels. Asked if this would not be practical when you needed more power, he answered: Yes. That power at the cement mill could be regulated along—and harmonize with that power which can be generated at the wheel. The two harmonize together [219—127]

Asked when the man at the cement mill, some eight thousand feet distant, needs to turn on some 500 more kilowatts, is somebody to run down to the plant and close the gates on the turbines, whether that is practical? He answered: They are all

(Testimony of Floyd W. Allen.)

closed down due to low water, you could not turn them on by throwing extra load on. Asked if that would restrict the load, he answered: Yes, it would restrict the load. Asked if he would want that to be done in practical operation, he answered: That they were particularly willing to do it in this case because they could regulate the cement mill and adjust the manufacture to meet the power available. Asked if it would be practical not to take the power when it is available and by just automatically turning on the power, he said: That to draw on the pondage was very impractical because it is of no particular consequence; it is limited in area, and very shallow in depth.

He testified that when the wing-dam should be completed there will be no return of water below the reef C–C to the plaintiff's property. That the point of return of the water is below the plaintiff's property. That there would not be any return of water across the wing-dam below reef C–C, to the plaintiff's side of the river at low stages, nor would there be any at a stage of 1347 second-feet. Asked if this would then dry plaintiff's Lot 2, he said: With the exception of 120 second-feet flowing by it. He stated that they were not intending to put any control gates on the head of the canal except for the purpose of protection against sudden floods or foreign substances entering the canal, or things of that kind. That there would be no automatic control gates; just controlled by hand.

Asked if they intended to use either of these units of their electric plant as a sort of a stand-by plant,

(Testimony of Floyd W. Allen.)

[220—128] to operate the two together, the witness answered: That they would operate the two at once when they could, when they had the demand for power. That at other times the other unit would act as a stand-by, in case of breakdown, or something of the kind. (Tr. 261.) [221—129]

FLOYD W. ALLEN, redirect examination by Mr. KOLLOCK. (Tr. 261.)

The witness was shown

DEFENDANTS' EXHIBIT "N" FOR IDENTIFICATION.

He testified that it is the certified copy from the State Engineer's office of permit No. 3275 on file therein on behalf of the defendant city for 147 second-feet. Also permit No. 7942 which is for 980 second-feet. The exhibit was offered in evidence. It was objected to that there was no proper foundation laid, incompetent, irrelevant and immaterial as to the particular question under investigation, namely, the right to blow up the bed of the stream at a point where the blasting was done and remove rock therefrom; that the State Engineer has no judicial powers; that the plaintiff has never had its day in court upon these permits and that they are mere options for a right to use water. Attention was called to the fact that they are not final water rights,—that the certificates have not been issued upon any of them, and Mr. Kollock stated that he did not claim that they were final rights or had certificates issued thereon

DEFENDANTS' EXHIBIT "N" ADMITTED.
(Tr. 263.)

for such weight, if any, as the court may give them upon final determination of the case.

Mr. Kollock called the court's attention to the [222—130] fact that the permit originally issued on the 28th day of February, 1917, for the 147 second-feet provided for actual construction work to begin on or before February 28, 1918, and it had been extended to June 1, 1920, which continuances bringing it down to June 1st, 1933, and complete application of the water to the proposed use should be made originally October 1, 1926, now extended to October 1, 1933. The permit had full maps as they existed at the time attached thereto.

Mr. Kollock stated that the permit had been for 147 second-feet; that from this 25 second-feet had been sold but this is not indicated by the permit.

Mr. Kollock stated there was also application for permit 7942 based upon application for 980 second-feet with permit issued that limits thereon the actual work shall begin on or before May 26, 1932, and be thereafter prosecuted with reasonable diligence and completed on or before June 1, 1933; that it is noted thereon "the theoretical horse-power given above is based on 1300 second-feet of water. Total water appropriated and applied for includes the above 980 second-feet plus 220 second-feet with priority of 1899 and 147 second-feet with priority of February 20, 1917, total 1347 second-feet,—25 second-feet of the 147 second-feet have been released

to the Gold Hill Irrigation district,—balance of water considered waste and leakage."

The defendant then offered in evidence certified copy of the decree in the matter of the adjudication of the waters of Rogue River and its tributaries, entered in the Circuit Court of the State of Oregon for Jackson County and duly certified to by the County Clerk of said county and called special attention to the entries at the bottom [223—131] of column 2 on page 3 of that decree (printed decree), —entries are as follows:

> "NEILSON AND McCLURE (W. L. McClure agent) Gold Hill, Oregon, proof 27, Volume 1, priority 1879, 75 second-feet for power (250 horse-power) Braden Ditch; water to be returned to stream at or immediately below the place of use. Description of place of use, lot 3, Section 15, Township 38 South of Range 3 West of W. M., Jackson County, Oregon,

and the following entry:

> OREGON WATER AND POWER COMPANY, Gold Hill, Oregon, proof 30, Volume 1, priority 1899, to 220 second-feet for power (750 horse-power); power canal; water to be returned to the stream below place of use; description of place of use, diversion in Northeast of Northwest of Section 15,—place of use in Section 15, Township 36 South of Range 3 West of W. M., Jackson County, Oregon."

Counsel stated that he would have further documentary testimony concerning the present claimant

(Testimony of Floyd W. Allen.)

to these rights that both parties go to which was adjudicated by chain of title.

Plaintiff objected to the introduction of any evidence on the 75 second-feet and as a basis for that objection inquired of the witness where the point of entrance (place of use) of this water,—this 75 second-feet according to that decree which says lot 3, of Section 11, Township 36 South of Range 3 West of Willamette Meridian,—where is that point with reference to the property in controversy?

The witness answered that section 11 is the section immediately north of Section 15, upstream from Lot 1 and on the east bank of Rogue River. Plaintiff's counsel [224—132] objected that the water is not in controversy here; this water is under decree and must be returned above Lot 1 and therefore if it did have rights, it would be part of the waters that belonged to its land and not water that can be used on the opposite side of the river in this diversion that is planned in this case.

The court reserved ruling. The defendant renewed their offer of the decree of adjudication and the court said it would be received and the court would take under advisement the objections that had been made.

It was marked

DEFENDANTS' EXHIBIT "O"—DECREE.
(Tr. 266.)

Defendants' Exhibit "O" is a printed copy of a decree entitled "In the Circuit Court of the State of Oregon for Jackson County. In the Matter of the

Determination of the Relative Rights of the Various Claimants to the Waters of Rogue River and Its Tributaries, above the Mouth of the Illinois River, in Jackson, Josephine and Curry Counties." This printed decree is printed with three columns per page, covering 73 pages and eighty-four numbered paragraphs. It is dated April 26, 1919, and bears the certificate of the Clerk of said court that it is a true copy. It contains the following provisions:

"IV.

"That the following named persons, firms, associations, and corporations, although duly and regularly notified as required by law of the commencement of these proceedings and although afforded opportunity to present their respective claims, and to be heard herein, have failed and neglected to appear in these proceedings, or to submit or offer any proof herein of any right, title, interest, or claim thereto, in or to the use of, or the waters, or flow of the waters of said Rogue River or any tributary thereof involved in these proceedings; that the said persons, firms and corporations hereinafter named being in default herein, as more fully appears from the findings of fact of the State Water Board herein, are hereby declared to be in default, and are not entitled to any right, title, or interest in or to the waters involved in these proceedings, nor any part thereof, nor to any riparian rights, rights by appropriation or prescription or otherwise in respect to the diversion or use of said waters or any thereof, or to appear herein and subsequently hereto assert any right, claim to, or interest in, said waters,

or any of them, acquired, initiated or owned by them at or prior to the time of the commencement of these proceedings; and each of said persons, firms and corporations shall be, and hereby is, forever barred and estopped from hereafter asserting any rights heretofore acquired upon said Rogue River or any of its tributaries embraced within these proceedings, and shall be held, and hereby is declared, to have forfeited all rights to use of the waters herein involved, if any he had prior hereto, theretofore claimed by him; the persons, firms and corporations so being in default herein being as follows, to-wit:" (Following the words: "to-wit:" is a long list of names of persons, companies and corporations, alphabetically arranged. The names of the following companies or corporations do not appear in the said list of parties served and against whom default was entered as stated in said paragraph IV:

Prospect Construction Company.
Rogue River Electric Company.
Siskiyou Light and Power Company.
Condor Water and Power Company.
California-Oregon Power Company.
The California Oregon Power Company, plaintiff).

In said Exhibit "O" also appears the following provisions:

"V.

"That the persons, firms and corporations named in the tabulated statement of rights hereinafter set forth as entitled to rights of appropriation of the waters herein involved, owning or being in posses-

sion of lands bordering on said Rogue River or any tributary stream herein embraced, have at all times used, and claimed the right to divert and use, said waters by virtue of appropriation thereof, and have waived any riparian rights they or their predecessors in interest may have had or claimed to the use of said waters which may have heretofore attached to or been appurtenant to their said lands.

"VI.

"That in accordance with the findings of fact and order of determination of the State Water Board herein, both original and supplemental, as modified by this court, it is hereby determined, adjudicated, ordered and decreed that the following claimants and appropriators named in the following statement of their respective and relative rights have appropriated, and are entitled to the use of, the waters of the stream herein embraced under which their names appear, as of the priority date and to the extent set forth in said statement and that each of said claimants is entitled to, and shall have issued to him, water right certificate or certificates, according to law, in accordance with said statement, defining, establishing and confirming his title and right to the use of the waters of the particular stream or streams herein embraced to which he is hereby decreed a right, as set forth in said statement. That the name and postoffice address of each such appropriator of the waters of Rogue River and its tributaries herein embraced, together with the date of relative priority of each such appropriation, the maximum amount of such appro-

priation in cubic feet per second of time, in continuous flow, throughout the irrigation season herein fixed, the number of acres to which each irrigation right hereby confirmed is appurtenant, the use or uses for which said appropriation was appropriated and is now applied and to which such use is limited, the name of the ditch or ditches through which such appropriation is diverted, and a description of the lands to which such water right is appurtenant, set forth under the particular stream from which such appropriation is diverted, are as follows, to wit:"

Following the words "to-wit:" is the heading: "Rogue River." Under this heading there were introduced in evidence the following portions of said decree.

"NEILSON & McCLURE, (W. L. McClure, Agt.) Gold Hill, Ore. (Proof 27, vol. 1); Priority 1879; 75 second-feet; for power (250 horse-power); Braden ditch; water to be returned to the stream at or immediately below the place of use; Description of place of use: Lot 3, Sec. 11, Tp., 36 S. R. 3 W. W. M., Jackson County, Oregon."

"OREGON WATER & POWER CO., Gold Hill, Ore. (Proof 30, Vol. 1); Priority 1899; 220 second-feet; for power (750 horse-power); Power Canal; water to be returned to the stream below the place of use; Description of place of use: Diversion in NE¼ NW¼; Sec. 15; place of use in Sec. 15; Tp. 36 S. R. 3 W. W. M., Jackson County, Oregon."

"CALIFORNIA-OREGON POWER COMPANY, a corporation (Successor to Rogue River Electric Company), Medford, Ore.; Priority Aug. 5, 1902; 1560 second-feet from Sept. 1 to June 1

(Testimony of Floyd W. Allen.)

of each year; 1060 second-feet during June, July and Aug. of each year; for power (2600 horsepower); 10 second-feet additional for operating fish ladders; Gold Ray Canal and Dam; right limited to use of water and return thereof to stream at present point of return, below the power plant; See further Paragraph 11 of this decree; Description of place of use: Gold Ray power plant in S½ Sec. 18; Tp. 36 S. R. 2 W. W. M., Jackson County, Oregon."

"CALIFORNIA-OREGON POWER COMPANY, a corporation, (Successor to Prospect Construction Company), Medford, Oregon; (Proof 31, Vol. 1); priority October 8 1904; 150 second-feet for present use for power; right to increase to not to exceed 400 second-feet, upon compliance with provisions of paragraph 12 of this decree; Prospect Flume; water diverted returned to stream at Power House; Description of place of use: Prospect Power Plant in W½ NW¼; Sec. 6; Twp. 33 S., R. 3 E. W. M., Jackson County, Oregon."

The defendant then offered in evidence for all purposes as a part of defendants' case what was originally Plaintiff's No. 1 for Identification herein and the same was received and marked

DEFENDANTS' EXHIBIT "P" (Received).
(Tr. 266.)

The witness Allen was asked what the exhibit is and stated that it is an amendment of the plans of development filed with the State Engineer's office on April 8, 1931. It amends Sheet 1 and Sheet 2 of the former maps we filed in the State Engineer's office as shown in Defendants' Exhibit "B."

(Testimony of Floyd W. Allen.)

The witness testified that Defendants' Exhibit "B" indicates the condition of the records as they appeared in the State Engineer's office at the former trial of this case. [225—133]

The witness said that Defendants' Exhibit "P" indicates the filings since the last hearing, bringing them up to date.

The defendants then offered in evidence deed of conveyance from the Sheriff of Jackson County to W. L. McClure, covering the interest of Neilson in the water right designated in column 2, page 3 of the decree and it was marked

DEFENDANTS' EXHIBIT "Q." (Tr. 268.)

Mr. Reames offered to stipulate with reference to the ownership of property involved, but counsel proceeded.

Mr. Newbury offered a deed of conveyance from W. L. McClure to the City of Gold Hill to cover the same property, which was received and marked

DEFENDANTS' EXHIBIT "R." (Tr. 268.)

He offered a certified copy of the conveyance from the Oregon Water and Power Company to the Rogue River Public Service Corporation covering lots involved in this controversy and water rights in connection therewith marked

DEFENDANTS' EXHIBIT "S." (Tr. 268.)

He also offered a deed of conveyance from Robert F. Maguire, who was Master in Chancery in the United States District Court of Oregon, covering the same property to Newton W. Rountree, which was received and marked

DEFENDANTS' EXHIBIT "T." (Tr. 268.)
[226—134]

He offered a certified copy of a deed of conveyance from Newton W. Rouhtree to Irrigation and Power Company, marked,—received and marked

DEFENDANTS' EXHIBIT "U." (Tr. 268.)

He offered a certified copy of a deed of conveyance from Irrigation and Power Company to City of Gold Hill, which was received and marked

DEFENDANTS' EXHIBIT "V." (Tr. 268.)

He stated that all of these exhibits were certified copies. In addition he offered a certified copy of a patent issued by the United States to Francis Marion Fredenburg which he said covered the lots now claimed by the plaintiff in this case, which was received and marked

DEFENDANTS' EXHIBIT "W." (Tr. 269.)

Vol. 12, Page 625.

UNITED STATES OF AMERICA To FRANCIS MARIAN FREDENBURGH.

To all to whom these presents shall come Greeting:

Homestead Certificate No. 1761.

Application 2839.

Whereas There has been deposited in the General Land Office of the United States a Certificate of the Register of the Land Office at Roseburg Oregon,

whereby it appears that pursuant to the Act of Congress approved 20th May, 1862. "To secure Homestead to actual settlers on the Public Domain, and the Acts supplemental thereto, the claim of Francis Marion Fredenburgh, has been established and duly consummated in conformity to law, for the lots, numbered one and two and the East half, of the North East quarter of Section fifteen in Township 36 South of Range 3 West of Willamette Meridian in Oregon containing one hundred and fifty acres and forty hundredths of an acre, according to the Official Plat of the Survey of the said Land, returned to the General Land Office by the Surveyor General.

Now Know Ye, that there is therefore granted by the United States unto the said Francis Marion Fredenburgh, the tract of Land above described. To have and to hold the said tract of Land, with the appurtenances thereof, unto the said Francis Marion Fredenburgh, and his heirs and assigns forever: subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law. In testimony whereof I Grover Cleveland, President of the United States of America have caused these letters

to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington the 20" day of April in the year of our Lord one thousand eight hundred and eighty five and of the Independence of the United States, the 109th.

(Seal)

By the President—GROVER CLEVELAND.

By M. McKEAN, Sec'ty..

S. W. CLARKE,

Recorder of the General Land Office.

Recorded *Volum* 5, Page 66.

Filed and Recorded Feb. 6, 1886. W. H. Parker, County Clerk.

For Affidavit see Vol. I, page 243, Misc. Records.

[Endorsed]: U. S. District Court District of Oregon. Filed May 1, 1931. G. H. Marsh, Clerk. E-9126—4/23-31.

No. 6874. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jun. 18, 1932. Paul P. O'Brien, Clerk.

It was objected to upon the ground that no proper foundation had been laid, and it was incompetent, irrelevant and immaterial, and the Court ruled that "They are all in evidence subject to the objection."

Continued Examination by Mr. KOLLOCK.

Mr. Allen produced a brown print of the tracing that had been introduced in evidence and it was substituted for the original tracing.

(Testimony of Floyd W. Allen.)

DEFENDANTS' EXHIBIT "I." (Tr. 269.)
[227—135]

The brown print was marked as Defendants' Exhibit "I."

Counsel for the defense stated that some question had been raised as to whether the map from which the tracing was made had been introduced before. The witness testified that it was in court,—was identical with the one in court and substituted for the tracing. He stated it was introduced in the first case before His Honor Judge Bean at Medford and bore the file-mark of October 17, 1928, marked Defendants' Exhibit "R" in Equity Case 8991, the case which went to the Court of Appeals.

It was admitted in evidence and marked

DEFENDANTS' EXHIBIT "X." (Tr. 270.)

The witness testified that the tracing had been slightly changed as to the plan for the diversion dam at the uppermost reaches of the river.

Mr. Reames offered in evidence what was Exhibit "S" in the case that went to the United States Circuit Court of Appeals, E.-#8991. It was marked

PLAINTIFF'S EXHIBIT 20 FOR IDENTIFICATION. (Tr. 271.)

The witness Allen testified that this is an exhibit in the former case,—shows the Rogue River at point in controversy from the headwaters upstream to the north line of Section 15 and it shows the,—it was

(Testimony of Floyd W. Allen.)

taken from the survey of August, 1926, and no changes on it; that the markings in yellow are the estimated quantities of water passing through the various channels and openings in the river when the river is at the river stage of 1069.4 [228—136] at the point of diversion and the river has a total discharge of 770 second-feet. He stated that a portion of the marks in yellow are referring to elevations at the point in question,—meaning surface elevations. It bears handwriting of the witness placed there during the taking of the testimony and as a part thereof.

FLOYD W. ALLEN resumed the stand for recross-examination, April 30, 1931 (Tr. 273), by Mr. REAMES.

Mr. REAMES stated: "With reference to the decree for 220 second-feet, I have here the proof of claim upon which that was based, and I have here the original record from the County Clerk's office at Medford, which I found in the files of one of the old cases, and which ought to be back in the County Clerk's office. A very valuable document, Volume 1 of the Water Rights Statements and Adjudications of Waters of the Rogue River, and am bringing this record here simply for identification if no objection.

Mr. KOLLOCK.—Received without objection.

Mr. REAMES.—I am offering this proof of claim 30 in the Water Adjudication upon which was based the decree for 220 second-feet."

Marked PLAINTIFF'S EXHIBIT 20½. (Tr. 273.)

Plaintiff's Exhibit 20½ is proof of claim filed by Oregon Water and Power Company, an Oregon corporation, In the Matter of the Determination of the Relative Rights to the Waters of Rogue River and Its Tributaries, and is designated as claim No. 30, Volume 1 (Proofs of Claims) and is the proof of claim referred to in Defendants' Exhibit "O," page 3, column 2. This Exhibit "O" is a certified copy of the decree of the Circuit Court of the State of Oregon for Jackson County, In the Matter of the Determination of the Relative Rights to the Waters of Rogue River and Its Tributaries. This proof of claim, Plaintiff's Exhibit 20½, is the one referred to in column 2, page 3 of the Decree of Adjudication wherein 220 second-feet were adjudicated to said Oregon Water and Power Co. and which portion of said decree of adjudication was read into the evidence in this case.

Exhibit 20½ is a document upon forms submitted by the State Engineer in adjudication proceedings and is entitled:

"BEFORE THE BOARD OF CONTROL OF THE STATE OF OREGON

"Water Division No. 1

"Jackson, Josephine and Curry Counties

"In the Matter of the Determination of the Relative Rights to the Waters of the Rogue River and Its Tributaries. Water Diverted from Rogue River Through Power Canal Ditch.

(Testimony of Floyd W. Allen.)

"Statement and Proof of Claimant."

The proof of claim states that it is in the name of Oregon Water and Power Company, an Oregon Corporation, for waters out of Rogue River for power development; that the date of the initiation of the right is October 30, 1899, made by posting notice and recording same, certified copy of which notice is attached. The notice attached is one signed by J. J. Houck, locator, for 300,000 miner's inches of the waters of Rogue River, and the copy is certified to by the County Recorder for Jackson County, Oregon. The claim states that the water is to be used for power development. The claim is for 1485 cubic-feet per second of the waters of said stream for the manufacture of 5062 theoretical horse-power, through a diverting dam in the Northeast quarter of the Northeast quarter of Section 15, Township 36 South of Range 3 West; water to be conveyed by canal to the center of Section 15 for power-house equipped with turbines and generator and then returned to the river near the center of said Section 15. To the proof of claim is attached a blue-print showing a diversion dam across the river and a canal paralleling the river to the power-house at or near the bank of the River.

The witness Allen was asked whether he intended as [229—137] a part of defendants' plan of construction to blast any additional area in the river other than as has been blasted. He stated that as far as he knew at the present time he did not think they intended to blast anything further except the trimming up on the site in question, but

(Testimony of Floyd W. Allen.)

that they intended to remove the material that was shattered. The witness' attention was called to Defendants' Exhibit "P" and to the red letter "A" at the arrow down at the lower portion of the exhibit and he was asked what the area in the heavy line indicated. He stated that the heavy line indicates the shore line as existing at the present time. He was asked what indicates the amount that he proposes to excavate and stated there is nothing there indicating the amount proposed to be excavated except the westerly line of that area; that the heavy line merely indicates the shore line as existing up to date. He was asked to state how much he proposed to excavate at the point marked with a red letter "A" and the arrow from the words "This area to be excavated 6 feet below low water or an elevation of 1063.5 plus or minus," and said that the present contemplation is an area 30 feet in width extending from the north end of the first island from the west bank, and running southwesterly a distance of approximately,—in the neighborhood of 220 feet all told and 30 feet in width with the exception of an additional area taken out between the first island and the original mainland 20 feet in width.

He was shown Plaintiff's Exhibit 13 and asked whether he marked that there in red and stated "No." He was told that Mr. Olsen had testified that he (Olsen) had platted the description which the witness Allen had given in the former trial of this case as the ground which defendants intended

(Testimony of Floyd W. Allen.)

to excavate; that he had platted it on [230—138] this Exhibit 13 and marked it in red and this witness was asked whether it approximately indicated what they intended to remove and said that there is a previous description which he corrected to conform with the territory which he intended beginning at a point south 420 feet from the quarter corner between sections 10 and 15, Township 36, South of Range 3 West; thence west 10 feet to a point of beginning. The point of beginning he marked "A" in blue on Plaintiff's Exhibit 13,—thence south 20° west 220 feet to point marked B on Plaintiff's Exhibit 13, thence southeasterly along the western bank of the river a distance of 45 feet to a point marked "C," thence north 20° east 190 feet to a point marked D, being the northwest corner of the first island from the west shore of the river, thence north 70° west 30 feet to the place of beginning.

He was also asked to indicate thereon what additional area he intended to remove and answered an area approximately 20 feet in width which was largely embodied in the channel between the first island and the mainland as existing before blasting, —this diagonal strip was a point thirty feet southerly from the northeast corner of the first described land, thence southeasterly approximately 40 feet to deep water on the west channel of Rogue River, thence along the shore line and to a depth of 6 feet in a southerly direction to a point on the west bank of Rogue River and at a distance of approximately 25 feet, thence northwesterly approximately along

(Testimony of Floyd W. Allen.)

the original shore line of the west bank a distance of 30 feet and to the easterly line of the first described tract, thence north along the easterly boundary of the first described piece of land, to the place of beginning.

Asked how much additional area is there described from what was intended to be described in the former trial [231—139] he answered aproximately 20 feet for an average length of 30 feet on a diagonal; that practically none of it is off of the first island; it is a channel that existed between the first island from the westerly shore and the original mainland of the Rogue River. He said it was his understanding that the holes were drilled and shot a depth of 5 feet below low water; that they are going to that depth although they may probably have to go to 6 feet but it was only shot 5 feet.

At the court's request the witness marked the last described area hachured in blue that he had just given data upon by the letter "E" in blue; that this is all to be down to about the same elevation. Asked how this compared with the floor level adjoining it he stated it will compare on the average,—be about the average,—there are deeper spots in the west channel than the 6 feet mentioned in that area.

He was asked how far it is from the easterly portion,—he said it is about 18 feet east of the original bank of the stream; on that bank; that the original bank is shown by the dotted line on the exhibit.

(Testimony of Floyd W. Allen.)

He was asked to refer to the place marked "E" and from there to the bank of the river and to tell what that distance is which was called the upper or eastern portion of the tract marked "E." He answered that it was approximately 18 feet from the original bank of the river.

Redirect Examination by Mr. KOLLOCK. (Tr. 278.)

The witness, attention was called to the legend on the exhibit reading "This area to be excavated below low water at an elevation of 1063 feet" with an arrow point above it. He was asked to what area this referred,—what [232—140] is intended to be delineated by that area,—this area,—and stated it limits the area to the letters east of the line drawn from and shown as from A to B on the original map and shown in dot and dash line. The witness said that it was his impression that the matter of filing with the State Engineer's office regarding any right so far as filing is concerned is to give them the privilege of removing all that portion that they see fit but not intended to indicate actual intention of excavation but merely reserving the right.

Recross-examination by Mr. REAMES.

The witness stated that the heavy line is the shore line existing under present conditions by reason of the blasting and throwing loose rock over into the channel and into the stream causing more land to appear now than existed prior to the blasting.

(Testimony of Floyd W. Allen.)

He was asked if they were claiming the right to take out this land east of the red line that you have shown there for excavation and he answered that he did not know, as he was claiming that they had the right to remove what obstructions they deemed necessary to accomplish the construction of the power plant "we have in mind" if it requires all of the removal of that land within that area.

The witness was asked to indicate on the exhibit the portion that he intended to take out or remove and answered: "for the present time we do not intend to take up as far as that,—no we don't contemplate taking anything further than the area shown within the described tract of land plus the [233—141] area shown in blue marked as 'E.'"

Attention was called that he had filed this map with the State Engineer for the purpose of having the right to take out more if he desired and he stated that he did not see any necessity of limiting themselves at this time so far as the State Engineer's office is concerned. His attention was called to the fact that the plaintiff was on the other side of the river and desired to know what their intentions were and he said, "Well, I think I stated my position there,—in other words we intend to take out the thirty foot area as described plus the diagonal strip at this time and no more. If my chance (meaning "by") this is not sufficient we would like to reserve the opportunity to take out additional width in order to divert our quantity of water which we plan.

(Testimony of Floyd W. Allen.)

He stated that he figured on this removal of this blasted area in accordance with the quantity of water that they were going to take. He said that the area to be removed was practically 60 feet wide,—55 feet wide at a point about mean way between the northerly and the southerly portion marked by the line L–M in red. (Tr. 281.)

TESTIMONY OF JOHN WHITE, FOR DEFENDANTS.

JOHN WHITE, called as a witness for the defense, under direct examination by Mr. KOLLOCK, testified:

That he lives at Grants Pass, Oregon; is a registered professional engineer; has practiced about 23 years; has been city engineer at Grants Pass for 6 years; prior to that time he was in Colorado about 15 years, then went to California, New Mexico, Texas, Nevada, Idaho, and the [234—142] State of Washington; that he had been called upon professionally to make surveys for the defendants on Rogue River. Was first employed August 12, 1926, under instructions of Mr. Muirhead and Mr. Floyd Allen, engineer; under these instructions he made a complete survey of the region of Rogue River in this case including elevations at various points; and made a map and gave the information to Mr. Allen; that he has been in attendance at a number of trials in this case in one form or another in which many maps and blue-prints have been introduced in evidence by the defendants; that all of these maps

(Testimony of John White.)

have been based upon the original survey which he made; that the elevation 1,069 referred to is based upon his survey; that it means an elevation approximately above sea-level, meaning that instead of going to the Government mark to get his start he used a bench mark that had been established by County Engineers of Jackson County; that he checked the elevation in this bench mark later back to the Government bench mark at or near the depot at Gold Hill and that it agrees with the approximate elevation stamped on the bench mark by the Government. He said, now the approximate,—the Government,—for instance,—when they establish this bench mark the party at the time stamps the elevation that they make it on the cap that is on the bench, and as I understand it they just put the nearest foot; and later when they close their circuit they have a correct elevation which varies sometimes just a few,—from just a few inches to a foot. When I speak of approximate elevation, that is what I mean,—approximate elevation above their sea-level.

He stated that the Government records showed the elevation of 1,056 higher than the mark they have on the [235—143] bench mark now at Gold Hill. That all of the elevations shown in his survey and on the maps based thereon and offered in evidence are based on the same bench mark to which he had referred.

He participated in the measurement of the waters of Rogue River flowing in various channels about September 26th, 27th, and 28th, of 1930, and with Floyd Allen; that he never made any measurements

(Testimony of John White.)

before 1930; that he assisted Mr. Allen in measuring the current and volume of water flowing through various openings in September, 1930.

He measured it by using a Gurley Electric meter and a K. & E. mechanical meter for determining the velocity. They checked one against the other to be sure there were no errors in the work. He testified that he heard Mr. Allen's testimony as to the result of the measurements and they were correct. That at the time he made the survey he didn't know what use,—what was to be involved,—what it would develop into and he made the survey taking into consideration everything he thought was important at that time and never made any what would be called real cross-sections of any part of the stream until 1930; that in September, 1930, he took a cross-section of the portion of the river referred to as the reef along C–C in Plaintiff's Exhibit 9 in company with Allen and he thought two or three helpers and that Mr. Muirhead was there part of the time. They made the soundings in this manner: Picked up a line just above the reef,—a few feet above the reef; as near as they could determine the shoals, they had the shallowest water above the reef and they got the elevation of the bottom at the breaks as near as they could determine,—that is, the low places and the high places. [236—144] Asked if at that point it did actually go into the water, he answered,—right out into the water; had a rope tied to the rodman and anchored to the boat.

Asked how deep the water was about at the point

(Testimony of John White.)

where they measured he said the lowest elevation they got was 1066; that the depth of water on that reached about 3 feet or 3½ feet at the deepest place,—that he could see the bottom in various places, the water being clear, and see the bottom condition across where the work was being done. He was shown Defendants' Exhibit "F" and asked whether it contained correct measurements taken across the river at the time mentioned and he answered that it was a cross-section that Mr. Allen made from their notes take at the time and correctly represented it as far as he could tell,—that he didn't make it. He said that this work was done September 28, 1930; that since that time he has not had occasion to make any measurements exactly at that line. But in that vicinity he had on the previous Sunday taken a few elevations in the bottom along the reef. He was asked to indicate on Plaintiff's Exhibit 13 where the measurements were taken. He stated that near as he could tell the line already there; this little light blue line that is projected across from the point he had marked X with a blue pencil and approximately along this dim line and on a straight line across the narrows as near as he could tell to another point, which he marked with a blue X.

That he made several soundings,—fully a dozen and found several places there that had an elevation of 1066. That from the survey which he made in September, 1930, and this brief investigation which he made on the previous Sunday he thinks that the bottom of the river at that point is approxi-

(Testimony of John White.)

mately the same position as it was [237—145] in September, 1930, as indicated in the graph, Defendants' Exhibit "F."

That he has understood that at an elevation of water above 1066 there would be some water flowing over that reef at the present time; that the measurements which he made at this time he did not do as he had before because the water was too cold and approximately a foot deeper than at the other time. Asked how he made the measurements he,—on this last occasion, on Sunday, he said,—level rod. There was a sort of a bridge built across there made of poles and loose boards from which he worked.

He was shown a photograph

DEFENDANTS' EXHIBIT "Z" FOR IDENTIFICATION

and one marked

DEFENDANTS' EXHIBIT "AA"

and said that they were photographs taken at the site and structure to which he referred at that time. That she thinks the pictures were taken by Mr. Muirhead; that by putting the ruler down in the water they could see the end of the ruler about 5 inches below the surface; that they could see the bottom of the river before,—the water was very clear in 1930. That on the Monday following the Sunday mentioned, the water was still muddy but clearing up.

(Testimony of John White.)

DEFENDANTS' EXHIBIT "Z," DEFENDANTS' EXHIBIT "AA," RECEIVED IN EVIDENCE. (Tr. 290.) [238—146]

Cross-examination by Mr. REAMES. (Tr. 290.)

He testified that the Sunday referred to was the 26th of that month,—April, 1931. That the measurements on the reef that he found to be 66 were taken right along,—there were two poles put across the river approximately 14 feet apart with cross-pieces on them to make a walk through; they took them on the center of the bridge and on the up-stream side of the bridge. Asked how far from the lowest point of the reef they were taken he answered that as near as he could determine these were the lowest points on the reef and not exactly where he took the readings in 1930. That the water was up considerably higher and they took them before in a sort of "V" shape when they could see the bottom and tell how the reef ran. The bridge was built straight across and they just had to work from what was visible and worked there down off of this bridge,—very doubtful if anyone could get a real true section of the high actual part of that reef from the bridge.

Asked how far that was from either end of the bridge,—the west end or the east end, he said that the bridge was approximately east and west; that they started at the west end of the bridge. His attention was called to the fact that he had testified that they had found several elevations of bedrock that were 1066 and that the question was nearest

(Testimony of John White.)

which end of the bridge were these. He answered, —well on that the first one was about 6 or 8 feet out and then—he didn't have the measurement,—he didn't get the measurement at the points; that he was across the river and the rodman was giving the reading to him; that the rodman [239—147] was named Pomeroy in one case and another time Mr. Martin; and Mr. Muirhead and Mr. Pomeroy; that he believed Mr. Muirhead had the rod that time, but that he himself was on the other side of the river,—namely, on the west side; that he was shooting clear across; that they relayed them to him,—no, that he got the readings off of the rod but they tried to call the distances to him and the river made so much noise he couldn't hear them and he lost out on the distance. It was late in the evening and they didn't have time to obtain them and he didn't consider it sufficient,—he just wanted to get the check readings where the bridge was.

Asked by the Court if the men with them called the distances from the bank and he answered they tried to call the distances from the bank and the Court said, "You mean the readings on the level"? and he answered: "No, I got the readings on the level myself."

Asked if the river was so noisy in there that he coudn't hear across the river he answered,—not there I couldn't hear,—that is the reason I didn't have the distances. I didn't have time to go back and get them. It got late and started to rain and I had to quit. I just did it to get a check to see how that point would agree with the work we did

(Testimony of John White.)

before because I knew it was within along the line where we did the other.

Asked what instructions he had given about holding the rod,—how far apart were these soundings to be made by the man holding the rod which the witness was reading, he said he told them to find the lowest places on the upper side. They gave them to him they said about every six inches.

On objection the Court struck from the answer what the [240—148] others had said.

He testified that he was there again Monday afternoon but not Tuesday; that the river was clearing up Monday; Monday afternoon it was cloudy too, but was getting pretty well cleared up; that others were there taking measurements Monday. That just about the time he got there Mr. Warren's and his helper, who were employees of the plaintiff, came up there from down the river. They were quitting at that time; that he didn't see them taking any measurements but they evidently had just quit taking them.

He was shown Defendants' Exhibit "Z" and asked the names of the men in the picture, and he said he thought Mr. Olsen and a crew of men that worked there on Sunday; that on the bridge the man in shirt sleeves he believes is Mr. Olsen,—the other two men he does not recognize. The same answers would apply to the Exhibit "AA."

He said he was a witness in the former trial of this case before his Honor Judge Bean; was there throughout the trial. He said he believed that at

(Testimony of John White.)

that trial there was present Plaintiff's Exhibit 10, which is Plaintiff's Ex. 6 here, and that it was in evidence, including the sheet marked 2 showing all the bedrock elevations of the river at this same point to which he just testified.

His attention was called to the exhibit to the heavy line between stations 21 plus 17 and 19 plus 69.25; and he was asked if the heavy line indicated the surface of the bedrock of the river at that point according to that survey. He answered, just approximately,—that he didn't take any readings in the bottom of the stream that he recalls at that time,—that was just a projected line (Tr. 294). [241—149]

He was asked whether the dotted line on the exhibit indicates the cement that is to be put in and answered I think,—I didn't make that, Mr. Allen made it. He was asked if this map was before the court at that time (the first trial of this case before Judge Bean). He answered yes, sir. He testified that it was the only map that was introduced in the case that showed the elevation of the bedrock at that point.

He testified that he was a witness at the trial of that case in October, 1930.

He was asked whether he testified about having taken any bedrock elevations at that point on the preceding 28th day of September and answered: As I recall there was never anything said or asked about this; that he was not asked, that he recalls, at all,—that he does not believe anyone else was asked.

(Testimony of John White.)

That he does not recall of anybody having testified to these elevations that he is now testifying to that he found on September 28, 1930. He said he did not recall anybody testifying to them, and added, "but I had them." He said: I do not recall that anybody testified to them,—as to the elevations having been taken at that reef.

As to the datum used in computing elevations the witness testified that he had gotten the information originally from the county engineer which checked to within four one-hundredths of a foot with datum obtained from the State Engineer. That the elevations that he gave,—the Government engineer had given to him,—would be 1.056 foot higher than the elevation shown on that bench mark. In other words, the elevation of that bench mark now is 1084 and the elevation as the Government gives it is 1085.056. In other words, add to the figures on the top of the pipe (at the depot) 1.056. [242—150] That the witness used the same datum all the time. That the corrected Government elevation is approximately one foot higher than all of his elevations. That would make his elevation of the bedrock at the bottom of the river which he found to be 1066 read 1067. So that his elevation of 1069 would be 1070, and that the same would be true with the figures taken on September 28, 1930,—so that when he had 1066.4 it is 1067 instead of 66.

That when he was out on the bridge he took about a hundred elevations, which took him about an hour,—he did not keep track of the time. Asked for the record of the hundred shots he said he just

(Testimony of John White.)

had rod readings. Asked where they are, he said: I kept them,—that is, that he just put down rod readings that he made himself, and that from these he found about seven that were as low as 66, which corrected, would be 67; that he knows nothing of the width of these openings that went to that depth. He was asked whether he knew anything of the accuracy of the soundings,—he answered, within an inch and asked: What do you mean, vertical? And when question was: Yes, he answered: within an inch.

Redirect Examination by Mr. KOLLOCK. (Tr. 298.)

He was asked what is the fact as to whether in making the correction of the bench mark it would change all of the elevations to which he had been referring; as 1069 to 1070 and answered, well, it doesn't change the difference in elevation; you can go onto a rock and assume an elevation; just a question of the other elevation of the [243—151] low river bed; if you know the difference between those elevations you know what elevations come from others. The question was repeated and he was asked to answer it and whether absolutely the same results would arise as between the elevations of water and the height of the ridge at the point marked "reef" and answered yes.

Asked if the only point of correcting the elevation is to get the actual elevation at this point above sea-level, he answered yes. Asked if he had before testified that all the measurements to which

(Testimony of John White.)

he had referred at any time or which have been indicated on any of the maps introduced in the trial of the case are based upon his survey and his measurements of elevations are based on the same measurements or bench mark he answered,—Yes, sir.

Recross-examination by Mr. REAMES. (Tr. 299.)

He testified that it would be better for comparison for all to use the same datum and that without knowing what difference is between them it wouldn't be easy to make the comparison. Asked if he had taken these one hundred shots in an hour he answered,—might have been two hours,—he could not recall. He guessed about an hour or an hour or an hour and a half. He thinks that those he took were very accurate. (Tr. 299.) [244—152]

TESTIMONY OF W. H. MUIRHEAD, FOR DEFENDANTS (RECALLED).

W. H. MUIRHEAD recalled as a witness for the defendants, testified upon direct examination by Mr. KOLLOCK: (Tr. 300.)

He stated that the drilling preparatory to the explosions was begun October 16, 1928, and completed November 20, 1928; that the drilling was finished about ten days before the decision in a prior case pending; he testified that he was in charge of the explosions, the operation at the time

(Testimony of W. H. Muirhead.)

that the explosion was made and had charge of it personally.

His attention was called to the drawing that Mr. Allen had identified as the area proposed to be covered,—now included in the blasted area,—and asked whether that covers all the area they proposed to blast and answered it covers all the area that they proposed to blast except such squaring up as might have to be done,—it might be found that there were some jutting points or reefs in the bottom which would have to be removed to permit the free flow of the water.

He testified that on the previous Sunday he was present at the property with Mr. White who was there prepared to take level readings across section C–C, or any other section that might be determined they wanted levels; that by C–C he referred to the location C–C on Plaintiff's Exhibit 9 across the river on the east side thereof; the place being known as the reef; that in making the measurements the witness used the rod that sounded the bottom of the river in taking measurements across that channel on the log that was in the upper side of the cribbing,—the open stream; [245—153] that he used the rod every six inches as near as possible to insert the rod at that place because there was a very swift current; they took six inch intervals with the idea of getting away from any inaccurate measurements that might be developed by the blast,—for instance, a few feet apart when made on the side of the slope or across the ridge; that they missed some intervals of six inches because the planking across the two

(Testimony of W. H. Muirhead.)

logs prohibited them from getting the rod in at that particular interval; that they could not see the river where they were making the soundings; that he personally took the measurements Sunday at about noon and it was possible to see five and five and a half inches in the water; that the depth of the water varied from a few inches down to four feet at the upper log of the bridge; that he checked the visibility on Monday at seven and a half inches about the same time of the day; that he didn't get any information personally on Tuesday; that he had a man check it at 2:35 P. M. and in bright sunlight and he reported it as 35 inches.

The court, upon objection, struck this latter part out as hearsay.

He testified that he was present in September, 1930 during the taking of a part of the readings by Mr. White and Mr. Allen and Mr. Martin, their superintendent and a couple of other men from their plant assisting. The visibility was so clear you could see the bottom at any elevation up to 6 feet in depth; asked why, if he knew that the measurements made in the fall of 1930 were not on a straight line on the river such as those made on Sunday, being more or less V-shape, and answered: our men went over there and waded through the water seeking to find the highest point in the reef and upon covering that area thoroughly they determined that the highest points there [246—154] were going up from the shore line of the center island.

Objection was made that the witness was getting into hearsay and he continued that they waded the

(Testimony of W. H. Muirhead.)

water at that point,—that the witness was in a boat watching the operation and determined that the crest of the reef ran in a northeasterly direction to a point on the island along the line C–C on Plaintiff's Exhibit 9.

That they followed this line for a ways and then turned to the east again. Bottom contours were taken along the section because it was the section representing the highest point in the reef.

His attention was then called to some testimony concerning a dam operated by the plaintiff at Gold Ray and whether there had been made under hi direction a computation as to the elevation of the railroad track above the dam at Gold Ray and answered affirmatively; that it was made by their engineer Mr. Martin and based upon a geological survey bench mark several hundred feet from the dam.

The court sustained the objection that it was hearsay. The witness answered that he did not see any of the measurements taken but he personally measured it in an approximate way Tuesday. As to what he did Tuesday, he said that he measured it at approximately 20 feet from the top of the dam where the water flows over to the rails along the Southern Pacific track; 20.

Asked as to the condition and character of the railroad right of way, whether solid rock or not, he answered: cut through solid granite through that section for half or three-quarters of a mile.

He said that he had been in actual charge of the operations of the defendant cement company since

(Testimony of W. H. Muirhead.)

1919 [247—155] and familiar with all of the details of the operation as they are conducted there; that he is familiar with the electric load as taken for operation and with the peak load of such demand. He was asked whether in the operation of the cement mill there is a constant load, or otherwise. He answered: A cement mill runs 24 hours a day,—the producing part of the mill,—the only parts that would run ten or eleven hours would be some portion of the pressing unit or the shipping department,—also three 10-horse-power motors in the shop. The balance of the plant runs 24 hours a day when it is running, excepting during shutdowns, and our cement plant runs as any other cement plant,—that it is a very flexible unit in which they can operate a half day at a time, but you can operate your clinker producer end, and at our plant, as a great many other plants, this is done for continuous periods of from three to four months, and then at other times you will operate your cement or grinding end for a smaller period with the clinker end shut down. That type of operation is indulged in where the manufacturing company gets some benefit out of operating that way.

That defendant company had been buying power from plaintiff company and it would have been no saving to cement company in the past to have operated that way because the loads would amount to approximately the same thing. There might have been a few dollars per month, but it would not have been sufficient to warrant it in doing that.

He stated that he had available there their records

(Testimony of W. H. Muirhead.)

showing the consumption of electricity through a fixed period of time; that he had them as far back as 1923; that up to the year 1930 the maximum was 1312 kilowatts in one month which was the largest month's production the company [248—156] had even had at its plant. The average for the year would be well under 1100 kilowatts,—that is, the average monthly demand, while the average monthly consumption would run under 900. This was during the month of March, 1930. The minimum was during,—they had 512 kilowatts in June and during July by a statement, it said on the billing "no demand reading as consumption was too small." He said the consumption was low,—80 kilowatts in December,—that was a low month. He said that the demand for cement is in no way connected with the operation of the plant,—that they have storage facilities for 40,000 barrels of cement and often carry clinker storage up to 100,000 barrels and their average shipments for last year were under 20,000 barrels a month; that if they were to develop their own electric power through the proposed plant, it would be very easy from a cement manufacturing point of view to regulate the load so that it would not come heaviest upon the hydro-electric development when the river was at its lowest. Asked how, he answered,—well we rarely start our plant before March every year and we could start about six weeks or two months earlier and produce sufficient clinkers because of the early start to enable us to shut down several months during the middle of the year.

He was shown photograph marked

(Testimony of W. H. Muirhead.)

DEFENDANTS' EXHIBIT "BB" FOR IDENTIFICATION. (Tr. 308.)

and stated that it is a picture representing the stream of the Rogue River at the point covered by the blasted [249—157] area; that is, partially covering the blasted area, and shows the narrows through which they were not passing considerable water and also the cross-channel from the east to west side of the river that they intend to block off with the dam, which necessitates the opening of the blasted area. He stated that the picture was taken in 1928 before the blasting. That it shows the condition before; it shows work being done where they were constructing the old crib; that it has nothing to do with this at all and shows the area very well.

It was received in evidence as

DEFENDANTS' EXHIBIT "BB." (Tr. 308.)

Q. Will you mark on this photograph, if you have something to mark with, approximately the so-called blasted area and the,—first the so-called blasted area?

He answered that it was a little difficult on account of this high point of rock, the contour goes down below there, and the line that I draw will be quite a ways back from the bank of the river,—that this is a high point of rock and the contour drops probably 20 feet,—that he couldn't show it very well there, but here you could.

Attention was called that he had indicated that transverse channel that had been referred to as

(Testimony of W. H. Muirhead.)

reaching out from that and answered: I can mark that on this picture. Marked this channel on Exhibit "BB," "A," and the blasted area as "B." He said, now perhaps I am confused there in the transverse area,—you mean the transverse blasted area? [250—158]

Q. The channel you were blasting out from there.

A. I will have to change that and scratch off the "A" I put on.

Asked to mark the area that he had blasted out he marked it "C," stating: "C" represents the transverse blasted area, "A" represents the cross-channel of water from the east side of the river to the west side of the river which would be blocked off by the proposed permanent construction. That "B" represents the blasted area. He marked the narrows with a letter "D" stating this was the only area that they had at this time that would pass water down the west side of the river, with the exception of the cross-channel "A."

On Plaintiff's Exhibit 13 he indicated the narrows with a letter "W" in red.

At the Court's request the witness marked the point of rock that hides from view a portion of the blasted area with a letter "E" on Exhibit "BB," stating that it hides a small portion of the blasted area on the west bank.

He was then shown

(Testimony of W. H. Muirhead.)

DEFENDANTS' EXHIBIT "CC" FOR IDENTIFICATION. (Tr. 310.)

and stated that it is a view taken from the island on the east side of the narrows at the point marked N, Exhibit 13 looking downstream from that point; that it shows the west channel of the river with the headgates of the power canal in the distance and particularly shows the flow of the water from the east to the west [251—159] of the river that was marked "A" on Exhibit "BB."

DEFENDANTS' EXHIBIT "CC" RECEIVED IN EVIDENCE. (Tr. 310.)

(This exhibit is Defendants' Exhibit "CC." It must not be confused with the line C–C heretofore referred to in the evidence indicating the location of a reef as shown on several of plaintiff's exhibits, —for instance, on Exhibit 2 and on Exhibit 9, etc.)

The witness then identified Defendants' Exhibit "AA" and stated that he took AA about 11.15 A. M. on April 26th, and took "Z" at about 11:30 A. M. on April 27th.

DEFENDANTS' EXHIBIT "AA," DEFENDANTS' EXHIBIT "Z," RECEIVED IN EVIDENCE. (Tr. 311.) [252—160]

W. H. MUIRHEAD, witness for the plaintiff.

Cross-examination by Mr. REAMES. (Tr. 311.)

He testified that he had the power bills rendered to the Cement Company by the plaintiff, from Janu-

(Testimony of W. H. Muirhead.)

ary, 1930, to December 1930, and testified that they showed the monthly kilowatts used by the Cement Company as follows:

January,	512 kilowatts
February	1168 kilowatts
March	1312 kilowatts
April	1280 kilowatts
May	1256 kilowatts
June	512 kilowatts
July	none
August	1248 kilowatts
September	1240 kilowatts
October	1120 kilowatts
November	704 kilowatts and
December	80 kilowatts

That there was a range of from nothing to the maximum. It depends upon how much of the plant they operate; that they only operated half of it for a number of months, and that they operate the entire plant for probably two weeks of some months. If they decide to start up on the 15th of the month, their demand would be high for that month, and the consumption wouldn't be proportionately high. That hence the figures could be confusing.

His attention was called to his testimony where he had said that the cement company should operate twenty-four hours a day and said: Part of the time. The demand is very regular and uniform per day, but from the power company's monthly billings, it would not indicate to you it was. Asked if it were not quite a fluctuating demand, ranging from nothing to 1312 kilowatts, he answered: That is was

(Testimony of W. H. Muirhead.)

not; that he had some readings taken by the plaintiff as the demand of their mill, if we would [253—161] like to hear them. That they were very enlightening. He suggested that Mr. Emery took them, and he would give them. Asked if their electrical plant was to be built only for the manufacture of cement, he answered: That it was built primarily for the manufacture of cement, but that the company had a contract with defendant city to supply it with twenty kilowatts free, and any additional that it might want at one cent per kilowatt; that the company had opportunity in addition to that, unless stopped by the utility, of selling to any other customer that might be developed in that territory. And they would do that should the customer present himself.

When his attention was called to the fact that the pleadings show "not a public service" he answered: Wasn't that the question you asked, depends entirely on the service? He stated that the cement company could operate the plant solely for cement use, but naturally if it had an investment there, it would want to make the best use of it it could, and should business be such some year that they could sell only fifty per cent of their usual amount of cement sales, and the mill would be down proportionately lower, and they could find an outlet for their power, they would certainly sell it.

Concerning the railroad track and the Gold Ray dam up the river some four or five miles from the point in controversy, he stated that he did not want to be understood as saying that the company had a

(Testimony of W. H. Muirhead.)

right to raise that dam twenty feet, but just a reasonable percentage of that, probably sixty per cent of the twenty feet. That he did not know that they had the right, but that they might acquire it. It is an opportunity there to rehabilitate the old plant they have there. Asked if this did not involve the question of eminent domain between two utilities, he said: [254—162] That he would not attempt to testify as to how it could be gotten.

As to the readings of bedrock elevations that were taken on September 28th, 1930, he took none of these himself. He was simply on the ground while this was being done. That it was being done from the water in the stream, and an engineer on the bank. That he only verifies the readings that he took on Sunday. But as to those taken in 1930, he verified those be believes a short time ago by telling how they waded in the stream to find the highest points in the reef; that is all.

He stated that he was a witness in the former trial of this case, and present throughout the trial. Asked whether he testified to any readings having been taken at the reef, he answered: No testimony of that nature was presented in the case; it was never an issue. The only issue in that case was the cubical volume of the water flowing over a given point, and the contour at the bottom of the river, but no other was an issue. Asked whether or not he did on the stand at that time identify sheet marked "2" of what was then Plaintiff's Exhibit 10 (now Plaintiff's Exhibit 6), where the elevations of the river bottom is shown to be 68.2, he said:

(Testimony of W. H. Muirhead.)

That might have been offered as an exhibit to show we had plans filed with the State Engineer's office, but that as to a specific reference to Sheet 2, the contour line shown at the bottom of the sheet, he did not believe that was referred to by himself or anyone else before. That it is correct that that particular portion of the exhibit had been designed as a part of the plans for crossing the river in a previous condemnation case. (Tr. 316.) He did not recollect that he had identified any sheets. He identified the assembled sheets as being the plans.

For the purpose of refreshing his memory, he was asked to refer to page 2, as having been marked by the reporter, from the top of it, as page 3 of that Exhibit 10. It was pointed out that there is a large sheet 2, and there is the Exhibit 3 at the top of it. He answered: That in any event, it shows being made in [255—163] September, 1926, and didn't attempt of course to show the bottom of the river in 1930.

His attention was called to the fact that the first page had been made in 1930; that this was pointed out at the time; that this profile of diversion dam at the bottom of Sheet 2 was marked at that time as Exhibit Number 3 on the then Exhibit Number 10, now 6, and he was asked if that were not the fact?

Mr. Kollock asked by whom it was pointed out, and it was stated that it was pointed out by Mr. Reames. The witness answered: That might have been the case, my memory is not thorough on that, but I do know that no elevations of river bottom

(Testimony of W. H. Muirhead.)

were referred to, nor did I attempt to state what they were.

His attention was called to the fact that when he was put on the stand by the plaintiff at the beginning of this trial, and the plaintiff's counsel pointed this same sheet out to him, and pointed to the elevations there, and asked if any changes had occurred to change that, he stated that he did not recall, but the facts could speak for themselves.

The following questions and answers were then given:

"Q. You did not anyhow in your examination on the first day of this trial, whatever the record shows that was, you did not say anything about having been present when any river bottom elevations were taken in 1930, September, 1930?

A. No, I wasn't asked that question; no, sir."

He stated that on the Monday, previous to the giving of this testimony, he had spent a couple of hours at the property in question, being there at intervals; that he was there in the morning on the east shore, and took pictures and took some pictures from the west shore, and was back there in the evening when Mr. White concluded his survey. That on Sunday he sat there and [256—164] watched the engineers taking measurements for probably two hours. Was away to the mill for a couple of hours, and back again for a couple of hours more. He was there he would say four to four and one-half hours on Sunday. That he was working with Mr. White about an hour and a half on Sunday, handling the rod all of the time except when one of the other men

(Testimony of W. H. Muirhead.)

went over and took several readings which was about twenty minutes before they began to take theirs. "I think he made three or four shots when the other gentlemen were holding the rod."

Redirect Examination by Mr. KOLLOCK. (Tr. 318.)

The witness identified Defendants' Exhibit "D" as a statement as to the load test of the cement company in 1926, given him by an officer of the plaintiff. In response to the witness' request, made to Mr. Wm. M. Sheppard, of the plaintiff company to have such a test made. It was presented to the witness with the result of the test made.

He said that the test was made to determine just how much of a load in excess of their normal running load was required to start the plant, that probably being indicative of the varying loads that are spoken of at the cement mill. That the report goes through and shows—it shows the two departments of the cement plant that witness has spoken of that are possible of being run at various seasons of the year; it shows the demand of these separate departments; it shows the total demand of the plant. He read from it: "A test was made with everything shut down and then started up as rapidly as possible duplicating as near as could be the conditions that would be obtained after a power interruption." [257—165] He stated that they had a number of men stationed in their mill, and they started all the motors of the plant as quickly as they could at a given whistle. The demand was 940 kilowatts for

(Testimony of W. H. Muirhead.)

the fifteen minute average, reading by F. D. Emory, whom witness thought was a meter man or tester for plaintiff. The maximum demand from starting the entire plant from a standstill was 940 kilowatts by the meter. That this shows starting demand to be less than the regular monthly demand. The exhibit was received at Tr. 319.

The entire judgment-roll in case Number 3098 in this court, the one in which the decree was entered in 1911, was offered and received in evidence as

DEFENDANT'S EXHIBIT "EE." (Tr. 320.)

In the Circuit Court of the United States for the District of Oregon.

No. 3098.

CONDOR WATER & POWER COMPANY, a Corporation,

Complainants,

vs.

GOLD HILL CANAL CO., a Corporation, and OREGON WATER & POWER COMPANY, a Corporation,

Defendants.

R. G. SMITH and J. E. FENTON, Attorneys for Complainant.

PLATT & PLATT and GEO. H. DURHAM, Attorneys for Defendants.

MEMORANDUM DECISION.

BEAN, District Judge.—The pleadings raise an issue as to the quantity of water to which the defendants are entitled, but no evidence on that point was offered by the complainant, nor was it referred to at the argument. I therefore conclude that the defendants' claim as set up in the answer and sought to be supported by notices of appropriation given in evidence is, for the purposes of this suit, conceded. Neither was any question made by the complainant as to the right of defendants to maintain a dam across the river as they and their predecessors had been wont to do for many years. The only disputed question on which any evidence was taken was the right of the defendants to extend their dam over complainant's land on the south side of the river. As their right to do so is based upon prescription and not deed, their right of occupancy cannot extend beyond the limit of the land actually occupied by the old dam. Joy v. Stump, 14 Ore. 361. The evidence all shows that the south end of the dam as maintianed since the early 80's was at or near to what is referred to by the witnesses as "the old crib" while at the time of the commencement of this suit, the defendants were building cribs and doing other work preparatory to the construction of a dam which would extend about 200 feet south of that point, and over and across complainant's land. The land between the end of the old dam and the south end of the (192) proposed new dam has never been occupied by the defendants or their

predecessors in interest and clearly no right to use the same has been acquired by prescription. The complainant is therefore entitled to a decree enjoining and restraining defendants from constructing or maintaining a dam or other structure on its land south of the south end of the old dam, and one to that effect may be prepared and submitted for signature.

Filed February 27, 1911.

[Endorsed]: No. 6874. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jun. 18, 1932. Paul P. O'Brien, Clerk.

It was stipulated that all the annual filing fees required by the State Engineer's office have been paid by the City of Gold Hill on applications.

TESTIMONY OF HARRY OLSEN, FOR PLAINTIFF (RECALLED IN REBUTTAL).

HARRY OLSEN, recalled for the plaintiff in rebuttal:

(Questions by Mr. REAMES.)

He testified that he was present throughout the entire first trial of this case. (The one before Judge Bean in October, 1930.) That at that time nothing was said, nor was any evidence introduced concerning any measurements taken September 28, 1930, showing the bedrock elevations of the reef C–C. That in the trial of that case, the elevations that were used were the elevations shown as 1068.3, as shown on [258—166] the map that the defend-

(Testimony of Harry Olsen.)

ants had filed with the State Engineer. (Plaintiff's Exhibit 10 in the former trial and Plaintiff's Exhibit 6 here.) That he did not take any measurements of the reef prior to that hearing for the reason that they took the elevations so shown as being correct.

That on April 26th, 27th, and 28th, of 1931, the witness took measurements of that reef. The days were Sunday, Monday and Tuesday. Mr. Warren, the instrument man, Mr. Fleet, the rodman, and two helpers, Mr. Webster and Mr. Champion assisted, and on Tuesday morning Mr. Boyle was present. That the flow of the river on those days was right around 1490 second-feet. That on Saturday afternoon, on the 25th of April, two sixty-five foot poles with necessary planking were installed across the reef designated as C–C, on Exhibit 2, for the purpose of being able to make an accurate measurement of the reef in question.

He was shown Plaintiff's Exhibit 21 for Identification (Tr. 322), and said it correctly showed the condition of the water and the bridge that was so constructed for the purpose; it shows the water flowing over the reef and the bridge constructed for making the measurements. The picture was taken April 26th, 1931, Sunday and received as

PLAINTIFF'S EXHIBIT 21. (Tr. 322.)

That the bridge is sixty-five feet long. That the bridge did not cover all the water that is from the center of the river to the east shore; additional

(Testimony of Harry Olsen.)

planking was necessary in order to get to it. He said that first they ran a tie line, together with elevations over to the island in the center of the river so that they would be able to occupy a point averaging from fifty to seventy-five feet from the reef in question. [259—167]

The instrument man was within that distance so that he could hear them; hear what distance they called to him, and also enable him to read very accurately the elevations from the rod. That they took measurements along this bridge at the lower pole, and three feet up stream, five feet up stream, seven, nine and twelve feet from the down stream pole, and that they did that, took those first—these measurements on Sunday, and then went into the office and platted up the results; that it showed a general tendency where the controlling features of the reef would be. With this information they went out Monday morning, and subsequently Tuesday, and took and traced out on diagonal lines, and lines normal to the bridge, and lines parallel to the bridge, the exact location and elevation of the controlling features of the reef itself. In taking this, these elevations, we recorded the results: Generally on foot breaks, that is, a foot long. In some places half a foot and between those foot marks, the witness personally used a steel rod and line rod in feeling ahead or along the line, and felt along the bottom between each foot mark to determine the general contour of the bottom, so as to be sure that they could not miss any sudden or abrupt breaks. That it was done

(Testimony of Harry Olsen.)

with great care, and that in all they took over 450 readings, and this was done over a period of three days, probably utilizing in all ten or twelve hours.

That he made a tracing showing the results of that work and it was identified as

PLAINTIFF'S EXHIBIT 22 FOR IDENTIFICATION. (Tr. 324.)

He was asked to point out the reef and elevations that were taken, and said: That he referred to the rock island [260—168] in the center of the river that is located where designated in this location, and the east shore of the river is shown on the east shore. The direction of the flow is indicated by the arrow, and this is the plan of elevations taken over the reef. The lower pole was along this lower line.

He was asked if he meant bridge, and answered: The bridge from which we operated, and the upper one along the upstream line of figures as shown. These elevations shown as 69.5, 69.3 indicate 69.3. That is, we have left the tenth off. That these are the true elevations above sea level, based upon bench mark of the United States Geological Survey Bench Mark at Gold Hill depot, which true elevation is 1085.056. This is the corrected bench mark.

He testified that he used the true level; not the one shown on the depot; 1084. shown. That he added on to the one shown on the bench mark 1.056 feet, making the actual bench mark 1085.056. After taking these elevations which show here all in a line nearly, the witness said: That he platted these up and determined the general trend of the controlling

(Testimony of Harry Olsen.)

feature points of the reef. That they then went out the next day, and placed lines where they figured the controlling points would be, and took again,—that is where they had not taken before, very accurate measurements. As shown on the exhibit this controlling line, a, b, c, d, e, f, g, h, i, j, k, l, m, n, o, p, is not made up of just two lines. It is made up of quite a number. It naturally would be impossible to have the controlling points of the reef just nicely made up to show two straight lines. It follows certain breaks and deviations which are apparent in the bedrock formation. And this is all to scale, five feet to the inch. Above, on this exhibit, we have shown a cross-section taken along this line to these points, and designated, namely: a, b, c, d, e, f, g, h, i, j, [261—169] k, l, m, n, o, p, and it shows what the lowest points would be. As a matter of fact, we found no point on the controlling reef at elevation, or below the true elevation of 1067.3.

He stated that on Mr. White's notes would be 1066.7, a difference of practically one foot for all practical purposes. He said that the .056 is way on the other side of decimal point. It is true that we found elevations which would compare with the 1066, but they were outside of the controlling reef itself. (Bottom of page 325, Tr.)

Asked what he meant by "controlling line," he said the line as designated from "a" to "p" that he calls them controlling because they control the amount of water which will flow over the reef itself.

As to the one elevation which he found low, he

(Testimony of Harry Olsen.)

stated that it was just at one point. For instance, it shows up between h and i. It is really a little crevice in the rock. That it was not more than a foot wide on top, depending on the elevation that you came to. For instance, from elevation of 68 it would be approximately seven-tenths of a foot wide at the top.

Asked by the Court as to how much space there is on the blue line, he answered: This is an inch. That represents five feet. Each small division faintly shown represents a foot. On this end I have shown the scale. For instance: Elevation: This represents 1065, and this 1067 elevation, etc.

The Court said I mean from here to here, and he answered: That would be 3.3. The Court: 3 and 3/10. Answer: three feet four inches.

The Court said: And across the corresponding line right here? Answer: One foot eight inches. [262—170]

The Court asked him to designate the points, and he said: The first question I will designate as the distance between "a" and "b"; the second question I will designate as the distance between "c" and "d." At the Court's suggestion he marked all of the letters prime (′), a′, b′, c′, d′ in red pencil on Exhibit 22.

Asked if the one that he called as being below 68 was the only one that he found on the controlling reef; he answered: That is the only elevation found below 68 on the controlling reef. He said here is one "c" and "d" that is right at 68. He stated

(Testimony of Harry Olsen.)

that he meant according to the United States base, or true base.

He stated that this cross-section as shown from "a" to "p" is really a stretched out, you might call it, line representing the control of the reef. This line is 1070. That would correspond with the 1069 used in other computations.

He stated that at a surface water elevation of 69, there would be in the low place mentioned an area of about forty-six square feet of water which, at the velocity shown on Mr. Allen's drawing, Exhibit "F," of two second-feet, would amount to around one hundred cubic feet a second flow. And at 68 water surface elevation in their calculations, the area drops down to a little below five square feet; using again the velocity of two cubic feet per second, would make about ten cubic feet per second discharge.

Asked if at the times when such quantities of water were being discharged through that opening, there would be any water [263—171] going over any other portion, he answered: No. That it would just be going through the two small openings amounting to five square feet in the river. He stated that he had platted the reef on a map corresponding to Plaintiff's Exhibit 2, for the purpose of showing the location of the reef C–C. In addition to that he had made Plaintiff's Exhibit for Identification Number 23. He stated that Exhibit No. 23 is the same exhibit as Exhibit 2, with the exception that the outline of the reef, the controlling portion

(Testimony of Harry Olsen.)

of the reef has been marked on the drawing and designated as "a" to "p," meaning it is a, b, c, etc., to p, along with the legend and an arrow as follows: "Outline of reef as located April 26, 27, 1931. See detail plan and cross-section on map S–5266," which is Exhibit 22. He stated that this reef had been platted according to the survey to which he had just testified.

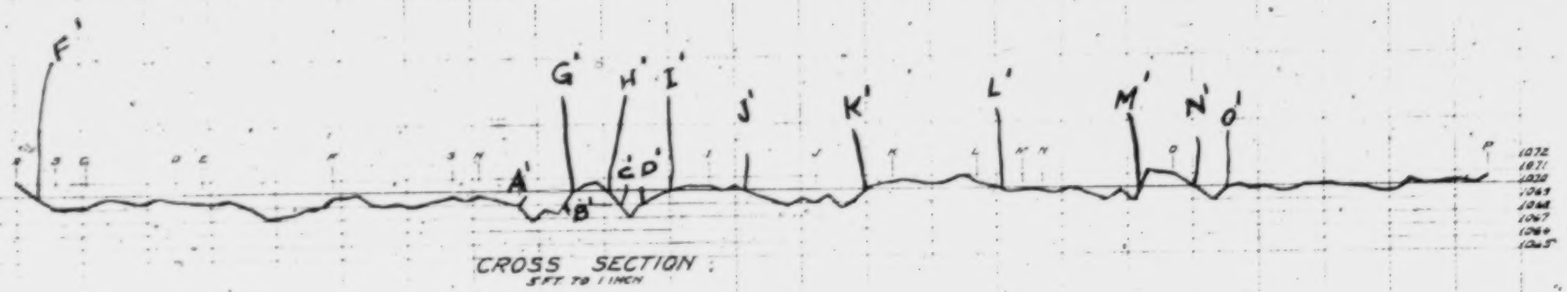
The two exhibits were received in evidence as

PLAINTIFF'S EXHIBITS 22 and 23. (Tr. 329.)

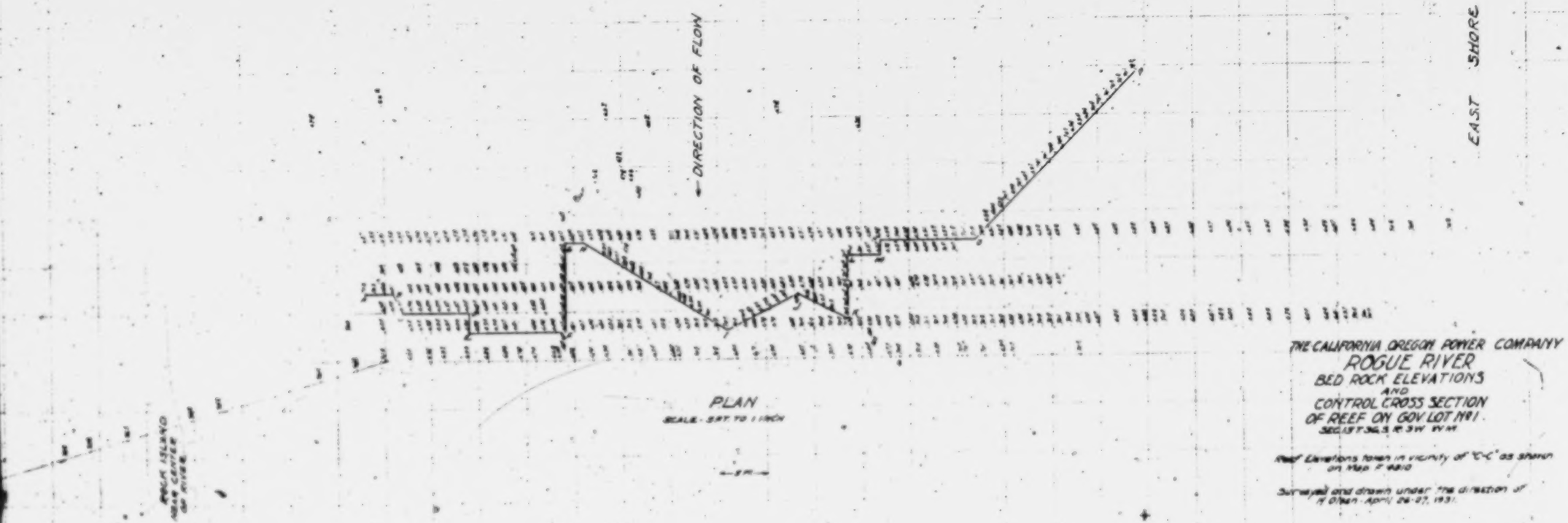
U.S. DISTRICT COURT
DISTRICT OF OREGON
FILED
MAY 1 - 1931

PLAINTIFF'S EXHIBIT NO. 22

Note USGS Elev 1070 = Allens Elev 1069



CROSS SECTION
5 FT. TO 1 INCH



PLAN
SCALE - 5 FT. TO 1 INCH

THE CALIFORNIA OREGON POWER COMPANY
ROGUE RIVER
BED ROCK ELEVATIONS
AND
CONTROL CROSS SECTION
OF REEF ON GOV. LOT NO 1
SEC. 13 T. 36 S. R. 3 W. W.M.

Reef Elevations taken in vicinity of 'C-C' as shown on Map F 4810

Surveyed and drawn under the direction of H. Olsen April 26-27, 1931.

S-5266

PLAINTIFF'S EXHIBITS NO. 2 AND NO. 23

NOTE

EXHIBIT NO 2 IS IDENTICAL TO EXHIBIT NO 23 EXCEPT THAT THE LINE DESIGNATED "A-P" WITH NOTE "OUTLINE OF REEF AS LOCATED APRIL 26-27, 1931, ETC." — IS NOT SHOWN ON EXHIBIT NO 2
DETAIL PLAN AND CROSS SECTION OF REEF IS SHOWN ON PLAINTIFF S EXHIBIT NO 22

GOV LOT 8

GOV LOT 7

GOV LOT 1

GOV LOT 2

ROGUE RIVER

POWER CANAL

Slough

Slough

IRRIGATION DITCH

S.P. R.R.

N89°52 W 2380'

T36 S. R3W WM

Surveyed by C. E. Boyden
Deputy County Surveyor
Sept 19 20 21 23 1928

FOR DETAIL MAP SEE F-4823

PROPOSED DIVERSION OF
BEAVER PORTLAND CEMENT CO
WITH REFERENCE TO GOV LOTS 1 & 2
SEC 15, T36 S, R3W WM

THE CALIFORNIA OREGON POWER COMPANY

F-4810

(Testimony of Harry Olsen.)

He was handed Plaintiff's Exhibit 24 for Identification, and said: It contained the original field-notes which were made on the 26th, 27th and 28th in connection with the survey of the reef. That he had checked them and that they were accurate, and from these notes the maps shown were platted. The notes were in Mr. Warren's handwriting. These field-notes were offered in evidence with the permission that when copied by the Reporter, they might be returned to plaintiff. They were marked

PLAINTIFF'S EXHIBIT 24. (Tr. 329.) [264—172].

Afterwards they were withdrawn from the record, as unnecessary, and explained later herein.

EXHIBITS 25 and 26 (Photographs.) (Tr. 329.)

The witness stated illustrate the manner in which the work was done in the measurement of the bed-rock elevations at the reef. They show Mr. Warren, the instrument man, Mr. Fleet, with the rod, and Olsen with the steel rod feeling the bottom of the river. He stated that early Sunday morning up to 8:30, or 9:00, the water was fairly clear. There were times when it got very muddy, and continued that way throughout the day. That on Monday, the 27th, it was a little better. In the afternoon the visibility was fairly good. Portions of the reef could be distinguished, but on Tuesday morning the river was quite clear, and you could distinguish the outline at the reef, the rocks, etc.

(Testimony of Harry Olsen.)

Attention was called to the testimony that had been given that perhaps the reef had been carried out by a flood. The witness was asked whether the water was clear enough at any of these times that they could distinctly see the reef. The witness stated that they could distinctly see the reef and feel it. The witness was shown Defendant's Exhibit "F," showing the work of Engineer Allen in the same territory, and he was asked whether it [265—173] indicates the care with which Olsen had done his similar work, and he answered: From these cross-sections the way the points are platted, it would indicate that there was no deviation between, say a distance of five feet. In other words, one would gather from this, that the defendants' shots were taken all the way from three—or two or three to as much as five or six feet; that is intervals.

The witness said that naturally we found that it was necessary to take them at closer intervals. He said, in fact Mr. Muirhead, and Mr. White yesterday testified to the fact that they went out on the 26th and took about one hundred shots at intervals of six inches, at three different cross-sections across the reef, or bridge which we had constructed; from this bridge, which is sixty-five feet long, completely over to the other shore, that is, from the island to the east shore; as conditions existed, it is pretty close to one hundred feet, and assuming that they needed to go over a distance of eighty feet, they took three of these cross-sections, that would be 240 feet which,

(Testimony of Harry Olsen.)

at six-inch intervals would amount to 480 shots, which they evidently did not take.

He said he found that the method which he had employed, that is by feeling ahead of the level rod and designating a point, that is by not taking as a rule more than a foot, sometimes a half of a foot, that they would have a true picture of the control of the reef. He said that in order to check their data, the levels were run from the bench mark at the station at Gold Hill, to the reef; the bench mark used at the reef in connection with the survey there. He was asked that in the lowest of these openings that they found on the reef, would there be, or would there not be any water passing if the water-level were reduced from 69 that Allen had said he was going to maintain, to 68? He [266—174] answered: Yes, there would be. He was asked if there would be any if it were reduced to 67, speaking of his figures? He answered: Of his figures, well, practically nothing. Speaking of his (Allen's) figures, there would be practically nothing going down. At one point which, according to his figures was an elevation of 66.7, there might be an area of perhaps three or four inches that would allow a small trickle to come down, which would probably disappear very shortly, but for all practical purposes, there would not be any.

As to the station of Engineer White when his readings were being taken, he was roughly speaking about four hundred feet distant from the rock.

The plaintiff then introduced in evidence stream flow records for definite periods, and bound separ-

(Testimony of Harry Olsen.)

ately. They were put under one number, and the sheets subnumbered. They have separate certificates on each. They were introduced as

PLAINTIFF'S EXHIBIT 27. (Tr. 332.)

At this point the plaintiff also introduced the two photographs, marked *plaintiff's*

PLAINTIFF'S EXHIBIT 25 and 26. (Tr. 333.)

Plaintiff produced

PLAINTIFF'S EXHIBIT 28 FOR IDENTIFICATION. (Tr. 333.)

The witness said it is certified by the office of the Cadastral Engineer, and that it is a township plat of Township 36 South, Range 3 West, W. M. Oregon. [267—175]

The witness said that he had designated thereon in red the point of return to the river of the seventy-five second-feet of water set up in the defendants' answer (meaning the Neilson and McClure seventy-five second-foot adjudicated right). He stated that the plaintiff's Lots 1 and 2 are in Section 15, and he is outlining them with black pencil designated by an arrow pointing to the lots. That this point of return of the Neilson and McClure right is about a mile up stream from plaintiff's lot 1. The map is a copy of a very ancient one, made at a time when Rogue River was called Gold River. (Tr. 333.)

TESTIMONY OF ROLAND WARREN, FOR PLAINTIFF (IN REBUTTAL).

ROLAND WARREN, a witness for the plaintiff, in rebuttal.

(Questions by Mr. REAMES.) (Tr. 334.)

He stated that his age was 33; his residence Klamath Falls, Oregon, his occupation surveyor, with more than nine years in that occupation; has been in the service of the plaintiff company seven years and four months.

He was with Mr. Olsen at the dates mentioned when they were making the examination of the reef called C–C on the map. He stated he ran the instrument and recorded the notes which were in his handwriting, and that they correctly show the readings which were taken at the time, and were checked by both Mr. Fleet and Mr. Olsen. He testified that the work was performed in the same manner as had been described by Mr. Olsen on the stand. That the work was done very carefully and accurately. That the [268—176] figures shown are correct. That the readings were taken Sunday, Monday and Tuesday, the 26th, 27th, and 28th of April, 1931. That the river was clear in early Sunday morning, and Monday afternoon it began to clear up again. Towards evening it was fairly clear; Sunday a bit of the reef could be seen. Tuesday morning it was practically clear and you could see very well then. He testified that they took over 450 readings. There were 121 to 123 at

points designated as controlling. He thought that all together about ten hours was used in taking shots on the reef.

The plaintiff here introduced

PLAINTIFF'S EXHIBIT 29 (Tr. 337),

a certified copy of judgment-roll in the original condemnation case brought by the defendant City of Gold Hill against the plaintiff to condemn a portion of Lot 1.

The plaintiff by agreement put in evidence

PLAINTIFF'S EXHIBIT 30 (Tr. 337)

which is a typewritten statement, showing the certain dates as to when various suits were started between parties over this property, etc. It covers the dates concerning the litigation pleaded in the answer.

Plaintiff's Exhibit 30 is a stipulation between the respective parties hereto entered into at the trial (Tr. 337), and contains the following:

"IT IS HEREBY stipulated by and between the parties hereto, in accordance with the understanding had at the trial of the case, that this stipulation could be made to take the place of evidence establishing the facts herein agreed to; that the suit in the Circuit Court of the State of Oregon, for Jackson County, by the City of Gold Hill against the Plaintiff herein, for the condemnation of nine (9) acres of Lot 1, described in the complaint, was begun in that court on the 5th day of October, 1926. That final judgment was entered therein

(Testimony of Roland Warren.)

for the defendant on June 13th, 1928. That on September 13th, 1928, the plaintiff herein in suit No. E–8991 filed its complaint in this court against the defendant in that case, City of Gold Hill and the defendant Beaver-Portland Cement Company. That this case went to final decree in this court on the 20th day of December, 1929. That on the 26th day of July, 1930, the plaintiff instituted this suit."

Cross-examination by Mr. KOLLOCK.

He stated that these readings on the reef were taken at intervals of every foot, and sometimes every half foot; at [269—177] every foot if the contour was more or less even, and then Mr. Olsen felt along between these foot marks, and if there was any jog in the contour of the river up or down—(interruption).

Q. If he found a lower point between the next foot measure he would have another reading at the low point in between. Do I understand that?

A. Not uneven surface—wherever it jogged.

Q. Or is low? A. Or is low.

He said that they would follow Mr. Olsen's direction as he ascertained the fact with the steel rod as to making the next reading. He stated that on Sunday before they were ready to take the reading, the visibility was good, but they could not see the bottom at the time of the taking of the readings on Sunday morning. That then they could see only a few inches; that it was a little bit better Monday morning. You could see the bottom only in places.

(Testimony of Roland Warren.)

Monday afternoon the water cleared up considerably. They took readings Monday afternoon. During forenoon part of the bottom could be seen at different places. Those that came near the surface of the water. He thought that at that time, Monday afternoon, while they were taking the readings, they could see two feet, not so much in the morning. On Tuesday it was quite clear, practically normal, which is very clear. Could see the general outline of the whole reef, except in the very deepest portion. It could not be seen where the water is fairly fast.

Mr. GILBERT FLEET was also present as a witness for the plaintiff, but it was stipulated that his evidence would be the same as that given by Mr. Olsen with reference to the manner and the readings taken. (Tr. 340.) [270—178]

TESTIMONY OF HARRY OLSEN, FOR PLAINTIFF (IN REBUTTAL).

Mr. OLSEN, called in rebuttal.

(Questions by Mr. REAMES.)

The witness stated that at the time of the taking of these measurements on the reef there was in the river a flow of about 1490 second-feet, with about five or six hundred feet flowing over the reef.

The following then occurred: (Tr. 341-2.)

"COURT.—There is one matter I would like to hear something about. It may not have anything to do with it, but I would like to have someone explain, and I would like to have the views of the

(Testimony of J. C. Thompson.)

witnesses on both sides, possibly, as to this amount that that canal takes at the various stages, if it is not already in evidence. The technical engineering data is in, but I don't appreciate the force of it.

Mr. KOLLOCK.—The amount it will take as proposed to be constructed?

COURT.—Yes.

Mr. KOLLOCK.—We will put Mr. Allen back on the stand, and Your Honor can interrogate him just for the questions you want, and if any discrepancies, the other side can do the same.

COURT.—It was touched upon yesterday by Mr. Reames, about the water-level being 69 in the forebay, that I confess I didn't understand the explanation.

Mr. REAMES.—We will endeavor to clear that up." [271—179]

TESTIMONY OF J. C. THOMPSON, FOR PLAINTIFF (RECALLED—CROSS-EXAMINATION).

J. C. THOMPSON, recalled for cross-examination.

(Questions by Mr. NEWBURY.) (Tr. 343.)

He was asked if he was familiar with the plaintiff's properties, and answered affirmatively. He was asked if he could designate on Plaintiff's Exhibit 28 property that the plaintiff owned between that in question and the Gold Ray Dam. He did so, as he said, largely from memory and guess work.

(Testimony of J. C. Thompson.)

He pointed out some pieces of property between the two points, as follows:

"We own one small piece in here in line between the railroad track and the river in Section 11; stated that they did not own the E.½ of the N.E.¼ of Section 11, but did own three-quarters of a mile of river frontage on the north side of the river, and that they had a small piece lying between the railroad track in front of the Walker Ranch."

Witness summed up his answer to the question of ownership as follows: Stating that he was not able to indicate on the plat the property which the Company owned between the property in controversy near Gold Hill and the Gold Ray dam, except generally as follows:

"We own, as I say, that part of the quarter-section lying between the railroad track and the river in front of the Walker place on the south side of the river between lots 1 and 2 and the Gold Ray plant; on the north side of the river we own river frontage of three-quarters of a mile," but witness could not mark it on the map to designate it. Asked specifically as to whether the Company owned the E.½ of the N.W.¼ of Section 11, witness answered, "I think we own that; it is a very irregular piece there, I could not describe it as just that." [272—180]

In further reference to this line of cross-examination, Mr. Reames, having objected to its introduction as incompetent, irrelevant and immaterial, stated, "If they are going to submit, would like to

(Testimony of J. C. Thompson.)

go into the adaptability of it for power purposes; just because you own land, it is no sign it is a power site; if it was, 'there are lots of power sites in the world.' "

Asked when the plaintiff acquired the various rights and properties along here in Section 11, witness stated in 1921, at the same time they acquired the other property, and that he thought they acquired that from the same predecessors in interest as those from whom they acquired Lots 1 and 2.

In reference to the further question, the witness stated that the California Oregon Power Company's present name is "The California Oregon Power Company," and that the predecessor in interest of The California Oregon Power Company, was "California-Oregon Power Company."

There was read in evidence from Defendants' Exhibit "O," portion with reference to the Decree at Gold Ray, showing the point of return of the water from the Gold Ray Dam. The portion was considered read.

It stated: "Right limited to use of water and return thereof to stream at present point of return below the power plant. * * * in S.½ of Section 18, Township 36 South of Range 3 West, W. M." (Tr. 350.) [273—181]

Mr. Kollock stated that he suggested to Mr. Reames that inasmuch as the defendants had no objection to Mr. Olsen's field-notes (Exhibit 24) that the parties stipulate that the tracing was correctly made, as based upon the field-notes in question, and

that therefore the field-notes became immaterial, and may be withdrawn. Accordingly, the record shows that

Plaintiff's Exhibit 24 was withdrawn. (Tr. 351.) [274—182]

TESTIMONY OF HARRY OLSEN, FOR PLAINTIFF (RECALLED—CROSS-EXAMINATION).

HARRY OLSEN, recalled on cross-examination, questions by Mr. Kollock. (Tr. 352.)

The witness' attention was called to Plaintiff's Exhibit 22 and the jagged line thereon and he was asked as to how he arrived at the elevations shown on the profile.

He stated: They were arrived at by taking actual elevations along that jagged line,—for instance, the jagged line represents as you might say the control on the reef; that the controlling points are determined by taking the elevations. They are the highest points in the reef itself and controlling because the highest point would control the amount of water allowed to flow over the reef.

His attention was called to the particular line marked 69.6. He was asked: How do you determine the control line at that particular point? And answered: It doesn't occur at that point 69.6. Asked where the control is, he answered in this case, 69.4,—that runs lower.

He was asked how the point is determined,—point "E" there that you are marking, how is that

(Testimony of Harry Olsen.)

determined? He answered by direct measurements certain distances from this control line and east from there,—that was accurately chained,—measured out at that point gave the elevation of 69.4.

The court suggested to the witness that Mr. Kollock was trying to show, as the Court thought, how [275—183] the controlling points are determined, —how you determine it is going to be the high point.

Mr. Kollock asked: "You took measurements at all these six points on that north and south line, didn't you?" and the witness answered in the affirmative; that he took six measurements on the north and south line at that point. It was pointed out to the witness that he had taken these measurements at various points,—some at one elevation and some at another, and asked how did he determine that the control was at the point which is at "E" rather than another point which is further up, and answered: by connecting the points there as to (interruption,—what points?) answer: At various points by connecting the highest points of the reef.

Asked if it was not true that he had constructed this jagged line by securing the highest points of the six measurements in the north and south line at a point on the east and west line and answered "not exactly."

Asked to explain, he said that he would start over again. That on Sunday they took these measurements early along parallel lines at zero, 3, 5, etc., from the downstream section.

Q. Assuming that these measurements made at the point are the correct measurements at the point

which you have indicated, how do you arrive at these,—when you have platted these points, then how do you arrive at this line? He answered, by connecting the points,—that is, from foot to foot and making a continuous line that will show in effect a barrier or the controlling reef; and all these,—they must be connected, that is to say, the half a foot or foot between. There can be no jumps from one to the [276—184] other so as to leave any open space which might allow the water to pass through there. In other words, this is really a close line and continuous, as you see in the cross-section.

Q. I don't see how you constructed that line unless *connected some* predetermined point; must have determined your point first and constructed the line.

A. Yes.

Q. How do you determine this point through which your line was being constructed?

A. By measuring with a tape measure. I determined them in the field-notes and platted them on here and then connected with this line.

He was asked that after he had made this group of measurements,—assuming they were correct,—Mr. Kollock said that he assumed that the witness would take the highest point in this north and south line measurement which he has taken at that point and connect them,—in other words, Mr. Kollock said, I don't see how you arrive at the point you marked "13."

The witness answered that he had explained, that on Sunday they went out and took most of the measurements; that is in the east and west direction;

(Testimony of Harry Olsen.)

and that of course you might have hit any elevation there but that they wanted to go over large enough area there and to be able to connect these various points together so as to form a continuous line which would show the exact location of the control line. Having platted these points they could see by following along the line that this was high,—71,—71,—etc., and if they continued straight across like that that they would would have hit some low points; [277—185] so they saw that the tendency was there,—that there was a long reef in there,—a higher part of the reef running up and down stream so they took the measurements the next day exactly on the line shown to trace out what the elevations would be by going in that direction; similarly they found there was a tendency rather than to continue way down here, it would drop down,—it would be a lower elevation; that we should turn; the controlling reef itself was turning upstream; and that they put the tape measure along there and accurately measured to check that; it shows here as correct elevations along the reef; and continued in the same way and traced out these points onto the reef itself which are the controlling elevations of the reef and they are continuous absolutely.

He stated that according to his calculations there would be one hundred second-feet flowing over the reef at an elevation of 1069 according to White' bench data, which would be 1070.056 according to Olsen's data using the velocity figures as furnished by Allen of 2.2 per second. He said that he was

not testifying anything about the velocity of the water at that point, but assuming Mr. Allen's velocity that at 1069.2 there would be approximately from 116 to 122 second-feet of water flowing at that point (reef).

Mr. Olsen was asked what the width of the water would be flowing over the reef at the point 1069,—the defendants' 1069, Olsen's 1070,—he was asked to mark points on the reef between which water would be flowing over. He answered from point F to G then there would be a little island there H to J; that of course the section is distorted,—pulled out, in other words the shore line,— [278—186] this is at an angle and naturally these points are angles, so it does not give exactly a true picture as to the exact width This is elongated; for instance, up to F in the east and west direction covers around 80 feet but stretched out along this line it is about 112 feet; similarly there would be J and K and L and M,—so many little islands in there that he did not know exactly what was wanted. He was told that they did not want the islands, and answered N to O. He said this would give about 67 feet of exposed water surface. He said that he did not have anything there to show the shore line of the river at low water; that the line would be carried further to the east than it would be at low water. That right now (when this work was done) that the amount of water that was in the river you have a showing of more water surface than would be at low water.

(Testimony of Harry Olsen.)

Counsel's next question was: "I see you are not able to draw the conclusion that I was interested in, from that. That is all."

Redirect Examination. (Tr. 359.)

(Questions by Mr. REAMES.)

He stated that under the conditions above described there would be portions of lands in between where these discharges were; there would be high places or rocks as shown; that as to the discharge through these various openings it would be considerably larger at some places than others; that in some places there would be just a little trickle; that there would be dry land across there as shown; that it must be remembered that these cross-sections [279—187] are just along this one point,—along the line of control; as you go down things change the course and direction naturally of this section and it may have a tendency to lead it over to the west for a while and then back to the east or it might all come together as is conceivable in one place below there.

The court said: The less water the more dry land you would have? And the witness answered yes.

Recross-examination.

(Questions by Mr. KOLLOCK. (Tr. 360.)

He stated that his determination of control point is based upon the flow of the water in the direction of the current or rather that the general direction of the flow is in that direction. In some places it is a little southeast or southwest; that at various

(Testimony of Harry Olsen.)

points in passing over the reef sometimes the water flows in a southwesterly direction and sometimes southeasterly; sometimes straight south; that sometimes it may do that and sometimes it may come together, depending upon minor points of control in the reef below.

Mr. Reames stated that before closing his case he would like to have the matter which the court had previously raised as to the engineering matters, disposed of.

Mr. Kollock stated that Mr. Allen was present and asked whether the court would ask Mr. Allen particular questions, and his Honor stated that he would rather the attorneys would take the burden of examining on the [280—188] engineering questions; that he didn't know much about it except to suggest in general,—the matter was not clear to him.

Mr. Kollock stated that he would be perfectly glad to do what the court wished. Accordingly Mr. Allen was called to the stand without objection and examined by the court.

TESTIMONY OF FLOYD W. ALLEN, FOR DEFENDANTS.

FLOYD W. ALLEN. (Tr. 362)

(Questions by the COURT.)

The court said that it was understood from Allen's testimony given on the previous day that when there was low water in the river that the defendants would keep the height of the forebay

(Testimony of Floyd W. Allen.)

1069,—approximately just the same; the witness answered that he distinguished between the forebay and the point of diversion,—the forebay being immediately above the plant. The court stated that is what it understood and asked did he so testify. The witness answered,—not the water in the forebay; that the water at the point of diversion is 1069; the water in the forebay which is at the end of the flume and entrance to the power-house will be at a materially less elevation,—that he testified to the exact elevation shown on a chart; that when the water at the point of diversion,—that is, above the uppermost wing-dam is at 1069 even, the water in the forebay will vary from 1069.0 to the point where the diversion is the maximum of 1350 second-feet, and the water in the [281—189] forebay will be 67.5, being a foot and a half below the level of the water at the point of diversion; that there is a foot and a half loss in the canal gates flume between the point of diversion and the power plant when the canal and the appurtenances are running at maximum capacity 1347 second-feet.

Mr. REAMES.—The question was,—at low water.

A. At low water.

The COURT.—Yes, take the case of low water running the highest capacity which you will run at low water,—the point which I am interested in, is there a place where you are going to take all of the water of the river? Do you contend that you ever take all of the water?

He answered that we do not contend that we will

take all of the water of the river at any time. He was asked by the court, What prevents you? The court said the thing that it was after was what Mr. Reames was trying to develop yesterday and the court didn't get a satisfactory explanation of it and the court asked, Why won't you take all of the water?

He answered: Starting with the power plant itself, is the gates of the turbine which would be automatically governed by certain head conditions; they have Tainter gate immediately above the power-house and forebay which is automatically controlled and which is at the end of the flume. It is under automatic control; then the restrictions of the capacity of the flume which is given width and given depth and designed to carry the maximum capacity when running,—when the river has a capacity of 1470 second-feet and the canal is reduced by like reasoning; and then there is restriction in the headgates [282—190] from the point of diversion into the entrance of the canal.

The court asked the height at the point where the forebay and flume connect; whether there was a flume there.

The witness answered that there was; asked its height he said its general,—the floor level of that flume would be 1062.0,—I believe I testified to. It is on that first one of these exhibits. The court said: Just approximately. And the witness answered it was 1062 he believed —1062.5 he believed he testified to at the bottom of the flume.

(Testimony of Floyd W. Allen.)

The court said the thing it could not understand is that with the bottom of the flume at 1062 and the water running through there why it doesn't draw away from this upper,—why it would not draw away from this quantity above all the time to allow running at capacity; that the court understood there were certain restrictions, but that if the blasted area were taken out wouldn't it take all the water down there through the canal for all practical purposes?

The witness answered,—no, it would not, and the court said it did not see why and the witness answered that he thought it was a very difficult thing to explain; that beginning with their gates he would assume a total area say of approximately 50 feet across, that intermittent piers cross those gates; that maximum capacity of this flume,—rather gates,—is based upon the river elevation; with all gates closed and the entire water of the stream compelled to go down the east channel, the river elevation which is 1470 second-feet would be approximately 71.7 feet; that is the river stage when running full; [283—191] that a part of that is divided and diverted into the westerly channel which would drop that elevation to 1069.0; that if by reason of the fact that the river channel itself were broadened out considerably and there is more area in the river and the canal combined to permit a lowering of the water to that extent, there is approximately a one-tenth drop between the headgates and above these gates. There is a total re-

sistance to these orifices, which are the gates, when running at 1350 second-feet, of 98/100 of a foot; if the gates are lowered and placed in the condition as they are with five additional gates in there, would be a loss of 55/100, almost 6/10 of a foot. If by any reason this water is lower, the section area is reduced by that much and decreasing the loss of head through the gates themselves, which would in turn decrease the volume of water materially through these orifices; in other words, the capacity of these gates is entirely based upon the loss of head that may be effective through these openings. Any material reduction in that destroys that loss of head which we have already allowed of 6/10 of a foot. That if you undertake to place any more than that through that diversion it would cause that loss of head to be greater and drop the water in the canal,—the flume, and all to an elevation that would permit only a given quantity of water to pass down the flume itself,—canal and flume,—going into the canal; that we will assume that the normal section is one and a half to one slope on the bank with flat bottom and approximately 60 feet upon the surface of the water. The capacity of the canal is based upon high-water level; but the level of the river when but 470 second-feet is passing down the river, it is materially higher than 69; [284—192] as the water decreases in the river in like manner, so does,—assuming this is 68.4,—as the water decreases in the river in like manner so does the water in the canal de-

(Testimony of Floyd W. Allen.)

crease, decreasing the most effective area of the cross-section by a probable, on top, 6/10 of a foot; assuming that to be 60 feet, and one and a half to one foot slope on the bank, and the base would be,—and our normal depth of 6 feet,—I think most of this is one to one slope on account of the rock,—you have a normal 324 square feet of area in the canal. If you reduce that by one foot from the top, you reduce that by 60 feet, or reduce that to 264 feet; as you drop the area of the canal, or even in the flume, your velocity decreases accordingly; it is not according to the area but that decrease reduces the quantity of water that may pass down either the canal or the flume in greater proportion than the loss of area that you have reduced, or the reduction of the height of the water. In other words 264 square feet in an elongated trapezoid of that character has less carrying capacity per square foot than the same sectional area 324 square feet has at that same dimension. That it is true in like manner where you have box flume with perpendicular sides and level section. In other words if the normal stage of the water is at 67.5, when it is reduced to 66.5 your reduction is one foot in that. Say the width is 18 feet, as in this case; your 18 foot loss of area there is greater in proportion than it represents as 18,—in other words the loss of cubic feet per second is greater in proportion than the loss of percentage in the area. The whole thing works itself back into,—

The COURT.—You are figuring on what flow of the river? [285—193]

(Testimony of Floyd W. Allen.)

A. I took the maximum diversion there which is the basis of drawing our calculation of 1320 cubic-feet.

Mr. Reames suggested that the court had asked for the conditions at low water and the witness answered, "Well, I have to make a specific case at low water under these conditions."

Mr. Reames suggested take 750 second-feet of water. The witness answered. You take 750 second-feet of water; that would divert about 630 second-feet; that would be just a trifle less than the capacity of one turbine under normal conditions, would be less loss of head in the canal and flume by reason of the lower amount of diversion but would also have that same like reduction in the cross-sectional area of the flume and canal.

Mr. Reames asked whether 630 second-feet would go through the flume and the canal and the answer was that it would. Whether it would do so at 1069 and the witness answered, "Yes. At low stage of water, only 770 second-feet of water in the flume; would not be up to 1069; water in the flume would be below that." Asked if it would go through, he said yes.

Cross-examination by Mr. REAMES. (Tr. 367.)

The witness was asked whether the 630 second-feet of water would pass through at 1068 and the witness answered that he would have to make a specific example of 1068. Asked if the water would go through the canal the witness answered: "Off-hand,—if everything was open, I am quite sure it

(Testimony of Floyd W. Allen.)

would, yes, if all the control [286—194] points were wide open,—I am quite sure." (Tr. 367.)

Asked if it would go through at 67 he answered: I doubt very much because it would lose the two feet of a most effective area out of this. Asked again if it would go through at 1067 he said he doubted it. He was asked if it would go through at 66 and answered that I would say positively that it wouldn't,—I would say almost positive that it would not go through at a river stage of 66. Asked if he admitted that it would go through at 68 he said:

A. "I said with all the control points open."

Asked if that wouldn't draw the water from above when the waterhead at 69 at the blasted area went down to 68,—whether that wouldn't pull the water from above he said, "As I said before, there are many factors that enter into that; one is the gates of the turbine itself." Asked to answer the question, he said: "I don't think it is fair to answer that question with yes or no," and the Court said, answer it as he could. He answered, "You cannot construct a power plant without certain conditions entering into the flow of the water. There is no loss in the open end flume which you are operating under, I mean with open end outlet. There is restriction and resistance to flow in the flume and canal and to put a specific,—to state a specific condition at all stages I don't see how I can answer that."

It was suggested to the witness that the question had been propounded at a definite water stage of

net 630 second-feet and an elevation of 69 which we now reduce to 68. He was asked whether that water was going to stand straight up at that point or whether the water is [287—195] going to run down and bring water from above. He answered,—with the flume wide open, I would assume your condition, at the outlet end, with no obstruction in there, it is perfectly natural that the canal will take its entire capacity, or such capacity as will be permitted at the elevation of water at entrance plus the head to be created by a certain volume of water within that canal. What it would be and what such head would be under those conditions, he would have to make specific conditions on it and figure it out as to what it would be.

He was reminded by the questioner that we already arrived at a given place. We had a stated elevation at the shattered area of 69, which we now reduce to 68; that we were trying to find out what the break would be there,—whether on any ordinary operation of the electric plant the water will be drawn down from above. He answered,—"Well, I have always stated the condition on which they would operate. In other words not only the operation of the turbine but in my previous testimony the character of the load is governing factor, and the regulation by consumption of that electrical energy just as much a factor as the turbines themselves."

He was asked to assume that the cement mill would grab all the power that it could get; that it was needing power, and to assume a reduction of the

(Testimony of Floyd W. Allen.)

water surface from 69 to 68 and to assume a flow of 630 second-feet of water in the canal,—could he answer the question whether that was going to draw the water down from above and answered that the turbines figured on,—if one turbine is running,—having capacity of 680 second-feet under [288—196] 22.8 head; as the head decreases the capacity of that turbine decreases; in other words the gates at the turbine are equivalent to any orifice; the quantity of water that will pass through the gates is subject to the head above; as he head increases the turbine will naturally take more volume of water and as it decreases it will take less water, by reason of its head on each side.

Asked what becomes of the volume of water he answered that it is discharged through the turbine; asked where the water was coming from he said from the forebay and from the river. Asked about the fluctuation of the water elevation from 69 to 68 he said that he hadn't said anything about fluctuating the water to 68.

He was reminded that he had said it would go through the plant and answered: "I said wide open; wide open conditions; everthing wide open; I didn't say under operating conditions."

He was reminded that the questioner supposed that he was talking about the operation of the cement plant and he answered: "Oh no," that he just meant to knock out the end and let the water run through.

He was reminded that the questioner was not contemplating that situation; that he was asking

(Testimony of Floyd W. Allen.)

that when there was a need of power at the cement plant and there was a flow of 630 second-feet running in their flume and they had a water surface elevation at 69 whether he could reduce that elevation to 68 and put the water through the electric plant having the demand for power at the cement plant. He answered that he imagined under certain conditions. He was asked to take the conditions of needing the power,—that they have two units and to put them both on. He [289—197] answered: "If there is only 770 second-feet of water, I might draw down the entire amount, yes, under those conditions, but I have always set up operating conditions in all my explanations."

He was asked if he could not do the same thing by drawing the elevation down to 67 and answered that he had never drawn to that low a figure,—that he did not know.

He was asked whether he could do it with 890 second-feet of water,—whether he could put it through the plant in ordinary operation of the cement mill. He answered, "Under certain operating conditions, if we failed to govern and govern properly, under the conditions you set forth, might put through 800 second-feet, yes."

Q. Might put through 900 too, couldn't you?

A. Would get probably a limit of 1200 limit. 1050 to 1200 second-feet.

Q. Put it all through at a water elevation of 68?

A. I don't know what the draft, the drawdown would be at the head waters under those conditions.

Q. I am talking about operating below 69 under the conditions described.

(Testimony of Floyd W. Allen.)

A. I can't readily concede the draft of the river down an elevation as low as 68 even under those conditions as you set forth.

Q. Well, you would draw all the water in the river under those conditions that you cut down to 68, wouldn't you?

A. Virtually speaking, yes; wouldn't be much left if we drew down to 68. I testified to that before. We have no desire to draw down to 68. [290—198]

Q. But as a matter of fact in the operation of your cement plant, when you needed all the power you could get, you could take all that water, couldn't you?

A. If you would want to set up a condition, ideal that is for taking all that water; probably you could under certain conditions take all the water in that river; but from the plan of operation and our intention of manufacturing both the electrical energy and how we intend to control the plant, plus the control of manufacturing cement, and the load we intend to put on it at that time, I do not think we will draw down the river below 1069.

But the fact remains that by the operation of your cement mill to get the power, all the power that you can, you can do it, can't you.

A. I have repeatedly said that we could.

Witness excused.

Plaintiff rests.

Defense rests.

(Tr. 372.) [291—199]

[Title of Court and Cause.]

Comes now the plaintiff, by A. E. Reames, its attorney, and tenders and presents the foregoing condensed statement of the evidence, and prays that it be, by the Court, approved.

It contains all of the testimony, condensed into narrative form, except the exhibits. It has been submitted to the defendants, and a copy thereof delivered to defendants' counsel.

Respectfully submitted,

A. E. REAMES,

Attorney for Plaintiff. [292—200]

State of Oregon,
County of Multnomah,—ss.

Due and legal service of the within and foregoing condensed statement of the evidence submitted for the court's approval is hereby acknowledged at Portland, Oregon, this 21 day of April, 1932.

JOHN K. KOLLOCK,

Of Counsel for Defendants.

Filed May 17, 1932. [293]

AND AFTERWARDS, to wit, on the 17th day of May, 1932, there was duly filed in said court an application for approval of statement of the evidence, in words and figures as follows, to wit: [294]

[Title of Court and Cause.]

APPLICATION FOR APPROVAL OF STATEMENT OF EVIDENCE.

Comes now the plaintiff and respectfully shows: That heretofore it lodged with the Clerk a condensed statement of the evidence, at that time serving upon counsel for the defendant a copy thereof. That since that time the counsel for the respective parties have together gone over said condensed statement of the evidence and modified the same where corrections were needed, and have now compiled said condensed statement as so agreed upon, and the same is herewith presented to the court for approval.

Respectfully submitted,
A. E. REAMES,
Attorney for the Plaintiff. [295]

The undersigned, of counsel for the defendants, DOES HEREBY CONSENT to the approval of said condensed statement of evidence as so presented at this time, and does join with the plaintiff in asking the Court to approve the same.

JOHN K. KOLLOCK,
Attorney for the Defendants.

Filed May 17, 1932. [296]

AND AFTERWARDS, to wit, on Tuesday, the 17th day of May, 1932, the same being the 60th judicial day of the regular March term of said court,—Present, the Honorable JAMES ALGER FEE, United States District Judge, presiding.—the following proceedings were had in said cause, to wit: [297]

[Title of Court and Cause.]

ORDER APPROVING CONDENSED STATEMENT OF EVIDENCE.

Upon the stipulation of the respective parties hereto that the condensed statement of the evidence now tendered for approval is a full, true and correct statement of all of the evidence taken at the trial of this cause except the exhibits, portions of which are, according to said stipulation, to be printed as part of the statement of the evidence and the rest of which counsel have stipulated shall by direction of the Court be forwarded with the record,—

IT IS HEREBY ORDERED that said condensed statement of the evidence be and the same hereby is approved and the court finds and orders that it is a correct statement of all of the evidence so introduced at the trial of the cause excepting the said exhibits aforesaid; and [298]

IT IS FURTHER ORDERED that said condensed statement of the evidence be filed with the Clerk of this court.

Dated this 17th day of May, 1932.

JAMES ALGER FEE,
Judge of the District Court.

Filed May 17, 1932. [299]

AND AFTERWARDS, to wit, on the 17th day of May, 1932, there was duly filed in said court a stipulation relative to sending original exhibits to Court of Appeals and printing record on appeal, in words and figures as follows, to wit: [300]

[Title of Court and Cause.]

STIPULATION FOR PRINTING CERTAIN EXHIBITS AND FOR FORWARDING OTHERS. (Not Exclusive.)

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel, that an order may be made herein directing the Clerk to print the exhibits, or portions of exhibits, as hereinafter listed, with the statements hereinafter recited, and for the forwarding of all of the exhibits not fully printed in accordance with said order or any subsequent order herein.

This stipulation is not to the exclusion of other stipulations for the printing of other exhibits, parts of exhibits or statements as may be agreed

upon, nor to the printing of such other exhibits, portions of exhibits or statements as may be embodied in a like order of the court.

The exhibits, portions of exhibits, and statements referred to are as follows: [301]

1. Memorandum decision of Judge Robert S. Bean in case in this court No. 3098 and which is embodied in Defendants' Exhibit "EE," which is judgment-roll of this court No. 3408.

2. Decree of Judge Bean in said cause No. 3098 and dated May 3, 1911, Plaintiff's Exhibit No. 15.

3. Decree of December 20, 1929, in this court in cause E.–8891, Plaintiff's Exhibit 16 here.

4. The following statement shall be printed:

"Plaintiff's Exhibit 20½ is proof of claim filed by Oregon Water and Power Company, an Oregon corporation, In the Matter of the Determination of the Relative Rights to the Waters of Rogue River and Its Tributaries, and is designated as Claim No. 30, Volume 1 (Proofs of Claims) and is the proof of claim referred to in Defendants' Exhibit 'O,' page 3, column 2. This Exhibit 'O' is a certified copy of the decree of the Circuit Court of the State of Oregon for Jackson County, In the Matter of the Determination of the Relative Rights to the Waters of Rogue River and Its Tributaries. This proof of claim, Plaintiff's Exhibit 20½, is the one referred to in column 2, page 3 of the Decree of Adjudication wherein 220 second-feet were adjudicated to said Oregon Water and Power Co.

and which portion of said decree of adjudication was read into the evidence in this case.

"Exhibit 20½ is a document upon forms submitted by the State Engineer in adjudication proceedings and is entitled: [302]

"'BEFORE THE BOARD OF CONTROL OF THE STATE OF OREGON

"'Water Division No. 1

"'Jackson, Josephine and Curry Counties

"'In the Matter of the Determination of the Relative Rights to the Waters of the Rogue River and Its Tributaries. Water Diverted from Rogue River Through Power Canal Ditch.

"'Statement and Proof of Claimant.'

"The proof of claim states that it is in the name of Oregon Water and Power Company, an Oregon Corporation, for waters out of Rogue River for power development; that the date of the initiation of the right is October 30, 1899, made by posting notice and recording same, certified copy of which notice is attached. The notice attached is one signed by J. J. Houck, locator, for 300,000 miner's inches of the waters of Rogue River, and the copy is certified to by the County Recorder for Jackson County, Oregon. The claim states that the water is to be used for power development. The claim is for 1485 cubic-feet per second of the waters of said stream for the manufacture of 5,062 theoretical horse-power through a diverting dam in the Northeast quarter of the Northeast quarter of Section 15, Township 36 South of Range 3 West; water to be

conveyed by canal to the center of Section 15 for power-house equipped with turbines and generator and then returned to the river near the center of said Section 15. To the proof of claim is attached a blue-print showing a diversion dam across the river and a canal paralleling the river to the [303] power-house at or near the bank of the river."

5. There shall also be included in said printed record the following statement:

"Defendants' Exhibit 'O' is a printed copy of a decree entitled 'In the Circuit Court of the State of Oregon for Jackson County. In the Matter of the Determination of the Relative Rights of the Various Claimants to the Waters of Rogue River and Its Tributaries, above the Mouth of the Illinois River, in Jackson, Josephine and Curry Counties.' This printed decree is printed with three columns per page, covering 73 pages and eighty-four numbered paragraphs. It is dated April 26, 1919, and bears the certificate of the Clerk of said court that it is a true copy. It contains the following provisions:

"'4.

"'That the following named persons, firms, associations, and corporations, although duly and regularly notified as required by law of the commencement of these proceedings and although afforded opportunity to present their respective claims, and to be heard herein, have failed and neglected to appear in these proceedings, or to submit or offer any proof herein of any right, title, interest, or

claim thereto, in or to the use of, or the waters, or flow of the waters of said Rogue River or any tributary thereof involved in these proceedings; that the said persons, firms and corporations hereinafter named being in default herein, as more fully appears from the findings of fact of the State Water Board herein, are hereby declared to be in default, and are not [304] entitled to any right, title, or interest in or to the waters involved in these proceedings, nor any part thereof, nor to any riparian rights, rights by appropriation or prescription or otherwise in respect to the diversion or use of said waters or any thereof, or to appear herein and subsequently hereto assert any right, claim to, or interest in, said waters, or any of them, acquired, initiated or owned by them at or prior to the time of the commencement of these proceedings; and each of said persons, firms and corporations shall be, and hereby is, forever barred and estopped from hereafter asserting any rights heretofore acquired upon said Rogue River or any of its tributaries embraced within these proceedings, and shall be held, and hereby is declared, to have forfeited all rights to use of the waters herein involved, if any he had prior hereto, theretofore claimed by him; the persons, firms and corporations so being in default herein being as follows, to wi

(Following the words: 'to-wit:' is a long list of names of persons, companies and corporations, alphabetically arranged. The names of the following companies or corporations do not appear in the

said list of parties served and against whom default was entered as stated in said paragraph 4:

Prospect Construction Company.
Rogue River Electric Company.
Siskiyou Light and Power Company.
Condor Water and Power Company.
California-Oregon Power Company.
The California Oregon Power Company, plaintiff).

"In said Exhibit 'O' also appear the following provisions:

"'5.

"'That the persons, firms and corporations named in the tabulated statement of rights hereinafter set forth [305] as entitled to rights of appropriation of the waters herein involved, owing or being in possession of lands bordering on said Rogue River or any tributary stream herein embraced, have at all times used, and claimed the right to divert and use, said waters by virtue of appropriation thereof, and have waived any riparian rights they or their predecessors in interest may have had or claimed to the use of said waters which may have heretofore attached to or been appurtenant to their said lands.

"'6.

"'That in accordance with the findings of fact and order of determination of the State Water Board herein, both original and supplemental, as modified by this court, it is hereby determined, adjudicated, ordered, and decreed that the following claimants and appropriators named in the following

statement of their respective and relative rights have appropriated, and are entitled to the use of, the waters of the stream herein embraced under which their names appear, as of the priority date and to the extent set forth in said statement and that each of said claimants is entitled to, and shall have issued to him, water right certificate or certificates, according to law, in accordance with said statement, defining, establishing and confirming his title and right to the use of the waters of the particular stream or streams herein embraced to which he is hereby decreed a right, as set forth in said statement. That the name and postoffice address [306] of each such appropriator of the waters of Rogue River and its tributaries herein embraced, together with the date of relative priority of each such appropriation, the maximum amount of such appropriation in cubic-feet per second of time, in continuous flow, throughout the irrigation season herein fixed, the number of acres to which each irrigation right hereby confirmed is appurtenant, the use or uses for which such appropriation was appropriated and is now applied and to which such use is limited, the name of the ditch or ditches through which such appropriation is diverted, and a description of the lands to which such water right is appurtenant, set forth under the particular stream from which such appropriation is diverted, are as follows, to wit:'

"Following the words 'to-wit:' is the heading: 'Rogue River.' Under this heading there were introduced in evidence the following portions of said decree:

"'NEILSON & McCLURE, (W. L. McClure, Agt.) Gold Hill, Ore. (Proof 27, Vol. 1); Priority 1879; 75 second-feet; for power (250 horse-power); Braden ditch; water to be returned to the stream at or immediately below the place of use. Description of place of use: Lot 3, Sec. 11, Tp. 36 S. R. 3 W. W. M., Jackson County, Oregon.'

"'OREGON WATER & POWER CO., Gold Hill, Ore. (Proof 30, Vol. 1); Priority 1899; 220 second-feet; [307] for power (750 horse-power); Power Canal; water to be returned to the stream below the place of use; Description of place of use; Diversion in NE¼NW¼; Sec. 15; place of use in Sec. 15; Tp. 36 S. R. 3 W. W. M., Jackson County, Oregon.'

"'CALIFORNIA-OREGON POWER COMPANY, a corporation (Successor to Rogue River Electric Company), Medford, Ore.; Priority Aug. 5, 1902; 1560 second-feet from Sept. 1 to June 1 of each year; 1060 second-feet during June, July and Aug. of each year; for power (2600 horse-power); 10 second-feet additional for operating fish ladders; Gold Ray Canal and Dam; right limited to use of water and return thereof to stream at present point of return, below the power plant; See further Paragraph 11 of this decree; Description of place of use: Gold Ray power plant in S½ Sec. 18; Tp. 36 S. R. 2 W. W. M., Jackson County, Oregon.'

"'CALIFORNIA-OREGON POWER COMPANY, a corporation (Successor to Prospect Construction Company), Medford, Oregon; (Proof 31,

Vol. 1); priority October 8, 1904; 150 second-feet for present use for power; right to increase to not to exceed 400 second-feet, upon compliance with provisions of paragraph 12 of this decree; Prospect Flume; water diverted returned to stream at Power House; Description of place of use: Prospect Power Plant in W½NW¼; Sec. 6; Twp. 33 S., R. 3 E. W. M., Jackson County, Oregon.'" [308]

6. Print Defendant's Exhibit "W," certified copy of patent from the United States to Francis Marian Fredenburg. (Omit recorder's certificate as to copy.)

7. The following statement shall be printed:

"Plaintiff's Exhibit 30 is a stipulation between the respective parties hereto entered into at the trial (Tr. 337), and contains the following:

"'IT IS HEREBY stipulated by and between the parties hereto, in accordance with the understanding had at the trial of the case, that this stipulation could be made to take the place of evidence establishing the facts herein agreed to; that the suit in the Circuit Court of the State of Oregon, for Jackson County, by the City of Gold Hill against the Plaintiff herein, for the condemnation of nine (9) acres of Lot 1, described in the complaint, was begun in that court on the 5th day of October, 1926. That final judgment was entered therein for the defendant on June 13th, 1928. That on September 13th, 1928, the plaintiff herein in suit No. E.-8991 filed its complaint in this court against the defendant in that case, City of Gold

Hill and the defendant Beaver-Portland Cement Company. That this case went to final decree in this court on the 20th day of December, 1929. That on the 26th day of July, 1930, the plaintiff instituted this suit.'"

Wherever in this stipulation it is provided that certain matters shall be printed, it means that such printed statement contains the substance of the exhibit or record from which the statement is taken.

8. The following statement shall be printed:

"Plaintiff's Exhibit 14 is a certified copy of the Oregon Public Service Commission's Rules and Regulations, with the rates fixed by such commission to govern [309] plaintiff's charges for electrical current to be furnished by it as a public utility operating in Jackson County, Oregon, and elsewhere."

9. There shall also be printed as a part of this record on appeal the exhibits listed below, thirty printed copies of each of said exhibits being hereby submitted for that purpose. Such prints of said exhibits may be inserted by the Clerk in the printed Condensed Statement of the Evidence at the pages in said Condensed Statement upon which is shown the introduction of said exhibits respectively (and for the assistance of the Clerk printing the record, it is here stated that such Condensed Statement of the Evidence contains an index of Plaintiff's Exhibits and an index of Defendants' Exhibits showing the respective pages in the Condensed Statement at which the introduction for

identification of the exhibit is shown. Reference is also there made to the page of the Transcript of the Testimony where the same appears. The Clerk printing said exhibits shall use his best judgment as to the places in said printed *printed* Condensed Statement where the prints of such exhibits shall be inserted. If absolutely necessary some or any thereof may be placed in an appendix.)

The said exhibits so to be printed, and of which copies or prints accompany this statement for such purpose, are as follows: [310]

PLAINTIFF'S EXHIBITS.

1. Plaintiff's Exhibit "Number 22 and Number 23."
2. Plaintiff's Exhibit Number 4.
3. Plaintiff's Exhibit Number 5.
4. Plaintiff's Exhibit Number 9.
5. Plaintiff's Exhibit Number 10.
6. Plaintiff's Exhibit Number 12.
7. Plaintiff's Exhibit Number 13.
8. Plaintiff's Exhibit Number 22.

DEFENDANTS' EXHIBITS.

1. Defendants' Exhibit "E."
2. Defendants' Exhibit "F."
3. Defendants' Exhibit "H."
4. Defendants' Exhibit "K."
5. Defendants' Exhibit "L."

10. The said order of the Court shall direct the forwarding of all of the exhibits herein which this stipulation does not require to be printed in full.

11, It is further stipulated that the Condensed Statement of the Evidence that has been filed herein has been agreed upon by the parties as a correct statement, and the said order should so determine. That it is a correct statement of all of the evidence in the case excepting the exhibits to be printed as aforesaid, and the other exhibits which are by this stipulation to be forwarded with the record on appeal. [311]

This stipulation shall serve as an application to the court to make an order in accordance with the terms thereof, which order may be made either upon the filing of this stipulation or embraced in a general or any other order for the printing of the record.

Dated at Portland, Oregon, this 17th day of May, 1932.

A. E. REAMES,
Attorney for Plaintiff.
JOHN K. KOLLOCK,
Of Attorneys for Defendants.

Filed May 17, 1932. [312]

AND AFTERWARDS, to wit, on Tuesday, the 17th day of May, 1932, the same being the 60th judicial day of the regular March term of said court,—Present, the Honorable JAMES ALGER FEE, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [313]

[Title of Court and Cause.]

ORDER DIRECTING THE PRINTING OF CERTAIN EXHIBITS AND THE FORWARDING OF THOSE NOT WHOLLY PRINTED, AND DIRECTING THE PRINTING OF CERTAIN STATEMENTS STIPULATED BY THE PARTIES TO BE CORRECT EXCERPTS OR STATEMENTS OF AND FROM THE EXHIBITS HEREIN.

It having been stipulated by the parties hereto, through their respective attorneys, that certain exhibits herein should be printed as part of the record herein, and as a part of the statement of the evidence herein, and that there shall also be contained in said printed statement the certain statements set out in said stipulation as containing the excerpts from exhibits introduced in the case or correct statements of and concerning the record of the case,—

IT IS ORDERED that there shall be copied by the Clerk of this court and printed as a part of the record on appeal and as a part of the Statement of the Evidence herein, the following exhibits introduced herein, to wit:

1. Memorandum decision of Judge R. S. Bean in cause in this court No. 3098, and which opinion is embodied the *Plaintiff's* Exhibit "EE," being judgment-roll of this court No. 3408.

2. Plaintiff's Exhibit 15.

3. Plaintiff's Exhibit 16. [314]

4. There shall also be printed the following statement to which the respective parties have so stipu-

lated as to the contents of Plaintiff's Exhibit 20½:

"Plaintiff's Exhibit 20½ is proof of claim filed by Oregon Water and Power Company, an Oregon corporation, In the Matter of the Determination of the Relative Rights to the Waters of Rogue River and Its Tributaries, and is designated as claim No. 30, Volume 1 (Proofs of Claims) and is the proof of claim referred to in Defendants' Exhibit 'O,' page 3, column 2. This Exhibit 'O' is a certified copy of the decree of the Circuit Court of the State of Oregon for Jackson County, In the Matter of the Determination of the Relative Rights to the Waters of Rogue River and Its Tributaries. This proof of claim, Plaintiff's Exhibit 20½, is the one referred to in column 2, page 3 of the Decree of Adjudication wherein 220 second-feet were adjudicated to said Oregon Water and Power Co. and which portion of said decree of adjudication was read into the evidence in this case.

"Exhibit 20½ is a document upon forms submitted by the State Engineer in adjudication proceedings and is entitled:

"'BEFORE THE BOARD OF CONTROL OF THE STATE OF OREGON

"'Water Division No. 1

"'Jackson, Josephine and Curry Counties

"'In the Matter of the Determination of the Relative Rights to the Waters of the Rogue River and Its Tributaries. Water Diverted from Rogue River Through Power Canal Ditch.

"'Statement and Proof of Claimant.'

"The proof of claim states that it is in the [315]

name of Oregon Water and Power Company, an Oregon Corporation, for waters out of Rogue River for power development; that the date of the initiation of the right is October 30, 1899, made by posting notice and recording same, certified copy of which notice is attached. The notice attached is one signed by J. J. Houck, locator, for 300,000 miner's inches of the waters of Rogue River, and the copy is certified to by the County Recorder for Jackson County, Oregon. The claim states that the water is to be used for power development. The claim is for 1485 cubic-feet per second of the waters of said stream for the manufacture of 5062 theoretical horse-power, through a diverting dam in the Northeast quarter of the Northeast quarter of Section 15, Township 36 South of Range 3 West; water to be conveyed by canal to the center of Section 15 for power-house equipped with turbines and generator and then returned to the river near the center of said Section 15. To the proof of claim is attached a blue-print showing a diversion dam across the river and a canal paralleling the river to the power-house at or near the bank of the River."

5. There shall also be included in said printed record the following statement:

"Defendants' Exhibit 'O' is a printed copy of a decree entitled 'In the Circuit Court of the State of Oregon for Jackson County. In the Matter of the Determination of the Relative Rights of the Various Claimants to the Waters of Rogue River and Its Tributaries, above the Mouth of the Illinois River, in Jackson, Josephine and Curry Counties.' This printed decree is printed with three columns

per page, covering 73 pages and [316] eighty-four numbered paragraphs. It is dated April 26, 1919, and bears the certificate of the Clerk of said court that it is a true copy. It contains the following provisions:

"'IV.

"'That the following named persons, firms, associations, and corporations, although duly and regularly notified as required by law of the commencement of these proceedings and although afforded opportunity to present their respective claims, and to be heard herein, have failed and neglected to appear in these proceedings, or to submit or offer any proof herein of any right, title, interest, or claim thereto, in or to the use of, or the waters, or flow of the waters of said Rogue River or any tributary thereof involved in these proceedings; that the said persons, firms and corporations hereinafter named being in default herein, as more fully appears from the findings of fact of the State Water Board herein, are hereby declared to be in default, and are not entitled to any right, title, or interest in or to the waters involved in these proceedings, nor any part thereof, nor to any riparian rights, rights by appropriation or prescription or otherwise in respect to the diversion or use of said waters or any thereof, or to appear herein and subsequently hereto assert any right, claim to, or interest in, said waters, or any of them, acquired, initiated or owned by them at or prior to the time of the commencement of these proceedings; and each of said persons, firms and corporations shall be, and hereby is, forever barred and estopped from hereafter asserting any rights here-

tofore acquired upon said [317] Rogue River or any of its tributaries embraced within these proceedings, and shall be held, and hereby is declared, to have forfeited all rights to use of the waters herein involved, if any he had prior hereto, theretofore claimed by him; the persons, firms and corporations so being in default herein being as follows, to-wit:' (Following the words: 'to-wit:' is a long list of names of persons, companies and corporations, alphabetically arranged. The names of the following companies or corporations do not appear in the said list of parties served and against whom default was entered as stated in said paragraph IV:

Prospect Construction Company.
Rogue River Electric Company.
Siskiyou Light and Power Company.
Condor Water and Power Company.
California-Oregon Power Company.
The California Oregon Power Company, plaintiff).

"In said Exhibit 'O' also appear the following provisions:

"'V.

"'That the persons, firms and corporations named in the tabulated statement of rights hereinafter set forth as entitled to rights of appropriation of the waters herein involved, owning or being in possession of lands bordering on said Rogue River or any tributary stream herein embraced, have at all times used, and claimed the right to divert and use, said waters by virtue of appropriation thereof, and have waived any riparian rights they or their prede-

cessors in interest may have had or claimed to the use of said waters which may have heretofore attached to or been appurtenant to their said lands. [318]

"'VI.

"'That in accordance with the findings of fact and order of determination of the State Water Board herein, both original and supplemental, as modified by this court, it is hereby determined, adjudicated, ordered and decreed that the following claimants and appropriators named in the following statement of their respective and relative rights have appropriated, and are entitled to the use of, the waters of the stream herein embraced under which their names appear, as of the priority date and to the extent set forth in said statement and that each of said claimants is entitled to, and shall have issued to him, water right certificate or certificates, according to law, in accordance with said statement, defining, establishing and confirming his title and right to the use of the waters of the particular stream or streams herein embraced to which he is hereby decreed a right, as set forth in said statement. That the name and postoffice address of each such appropriator of the waters of Rogue River and its tributaries herein embraced, together with the date of relative priority of each such appropriation, the maximum amount of such appropriation in cubic feet per second of time, in continuous flow, throughout the irrigation season herein fixed, the number of acres to which each irrigation right hereby confirmed is appurtenant, the use or uses for which such appropria-

tion was appropriated and is now applied and to which such use is limited, the name of the ditch or ditches through which such appropriation is diverted, and a description of the lands to which such water [319] right is appurtenant, set forth under the particular stream from which such appropriation is diverted, are as follows, to wit:'

"Following the words 'to-wit:' is the heading: 'Rogue River.' Under this heading there were introduced in evidence the following portions of said decree:

"'NEILSON & McCLURE, (W. L. McClure, Agt.) Gold Hill, Ore. (Proof 27, vol. 1); Priority 1879; 75 second-feet; for power (250 horse-power); Braden ditch; water to be returned to the stream at or immediately below the place of use; Description of place of use: Lot 3, Sec. 11, Tp. 36 S. R. 3 W. W. M., Jackson County, Oregon.'

"'OREGON WATER & POWER CO., Gold Hill, Ore. (Proof 30, Vol. 1); Priority 1899; 220 second-feet; for power (750 horse-power); Power Canal; water to be returned to the stream below the place of use; Description of place of use: Diversion in NE¼ NW¼; Sec. 15; place of use in Sec. 15; Tp. 36 S. R. 3 W. W. M., Jackson County, Oregon.'

"'CALIFORNIA-OREGON POWER COMPANY, a corporation (Successor to Rogue River Electric Company), Medford, Ore.; Priority Aug. 5, 1902; 1560 second-feet from Sept. 1 to June 1 of each year; 1060 second-feet during June, July and Aug. of each year; for power (2600 horse-power); 10 second-feet additional for operating

fish ladders; Gold Ray Canal and Dam; right limited to use of water and return thereof to stream at present point of return, below the power plant; See further [320] Paragraph 11 of this decree; Description of place of use: Gold Ray power plant in S½ Sec. 18; Tp. 36 S. R. 2 W. W. M., Jackson County, Oregon.'

"'CALIFORNIA-OREGON POWER COMPANY, a corporation, (Successor to Prospect Construction Company), Medford, Oregon; (Proof 31, Vol. 1); priority October 8, 1904; 150 second-feet for present use for power; right to increase to not to exceed 400 second-feet, upon compliance with provisions of paragraph 12 of this decree; Prospect Flume; water diverted returned to stream at Power House; Description of place of use: Prospect Power Plant in W½ NW¼; Sec. 6; Twp. 33 S., R. 3 E. W. M., Jackson County, Oregon.'"

6. The Clerk shall also so copy Defendants' Exhibit "W" omitting certificate of recorder.

7. The following statement shall be printed:

"Plaintiff's Exhibit 30 is a stipulation between the respective parties hereto entered into at the trial (Tr. 337), and contains the following:

"'IT IS HEREBY stipulated by and between the parties hereto, in accordance with the understanding had at the trial of the case, that this stipulation could be made to take the place of evidence establishing the facts herein agreed to; that the suit in the Circuit Court of the State of Oregon, for Jackson County, by the City of Gold Hill against the

Plaintiff herein, for the condemnation of nine (9) acres of Lot 1, described in the complaint, was begun in that court on the 5th day of October, 1926. That final judgment was entered therein [321] for the defendant on June 13th, 1928. That on September 13th, 1928, the plaintiff herein in suit No. E.–8991 filed its complaint in this court against the defendant in that case, City of Gold Hill and the defendant Beaver-Portland Cement Company. That this case went to final decree in this court on the 20th day of December, 1929. That on the 26th day of July, 1930, the plaintiff instituted this suit.'"

8. The following statement shall be printed:

"Plaintiff's Exhibit 14 is a certified copy of the Oregon Public Service Commission's Rules and Regulations, with the rates fixed by such commission to govern plaintiff's charges for electrical current to be furnished by it as a public utility operating in Jackson County, Oregon, and elsewhere."

9. There shall also be printed the following Exhibits:

PLAINTIFF'S EXHIBITS.

a. Plaintiff's Exhibit Number 22 and Number 23.
b. Plaintiff's Exhibit Number 4.
c. Plaintiff's Exhibit Number 5.
d. Plaintiff's Exhibit Number 9.
e. Plaintiff's Exhibit Number 10.
f. Plaintiff's Exhibit Number 12.
g. Plaintiff's Exhibit Number 13.
h. Plaintiff's Exhibit Number 22.

DEFENDANTS' EXHIBITS.

a. Defendants' Exhibit "E."
b. Defendants' Exhibit "F."
c. Defendants' Exhibit "H."
d. Defendants' Exhibit "K."
e. Defendants' Exhibit "L." [322]

Thirty copies of each thereof have been deposited with the Clerk, being a print made from the originals, and they shall be printed in the condensed statement of the evidence at the place therein which shows the introduction of such exhibits, respectively. Or if the Clerk should find this inconvenient he should so use such copies in said printing in said statement of the evidence as will be most convenient for the court.

IT IS FURTHER ORDERED that the Clerk of this court shall forward to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit all of the other exhibits in this case which this order does not direct the Clerk to print in full.

And based upon said stipulation,—

IT IS ORDERED that said condensed statement is a full, true and correct statement of all of the evidence received at the trial of this cause, excepting the exhibits referred to in said statement, certain of which exhibits are, by the terms of this order, directed to be printed, and all of the rest of which are by this order directed to be forwarded with the record to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 17th day of May, 1932.

JAMES ALGER FEE,
District Judge.

Filed May 17, 1932. [323]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered from 4 to 323, inclusive, constitute the transcript of record upon the appeal in a cause in said court, in which the California Oregon Power Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, is plaintiff and appellant, and Beaver Portland Cement Company, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and City of Gold Hill, Oregon, a Municipal Corporation, existing under the laws of the State of Oregon, are defendants and appellees; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by said appellant and is a full, true and complete transcript of the record and proceedings had in said court in said cause, in accordance with the said praecipe, as the same appear of record and on file at my office and in my custody, except that

captions, verifications, and acceptances of service omitted from said transcript, were omitted by direction of the appellant.

I further certify that the cost of the foregoing transcript is $49.20, and that the same has been paid by the said appellant.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 15th day of June, 1932.

[Seal] G. H. MARSH,
Clerk. [324]

[Endorsed]: No. 6874. United States Circuit Court of Appeals for the Ninth Circuit. The California Oregon Power Company, a Corporation, Appellant, vs. Beaver Portland Cement Company, a Corporation, and City of Gold Hill, Oregon, a Municipal Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed June 18, 1932.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6874

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE CALIFORNIA OREGON POWER COMPANY, a Corporation,

Appellant,

vs.

BEAVER PORTLAND CEMENT COMPANY, a Corporation, and CITY OF GOLD HILL, OREGON, a Municipal Corporation,

Appellees.

Upon Appeal from the District Court of the United States for the District of Oregon.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a Stated Term, to wit: The October Term A. D. 1932, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Friday the sixteenth day of December in the year of our Lord one thousand nine hundred and thirty-two.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable JULIAN W. MACK, Circuit Judge.

[Title of Court.]

ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. A. E. Reames, counsel for the appellant, and by Mr. John K. Kollock, counsel for appellees, and submitted to the court for consideration and decision, with leave to counsel for the appellant to file a reply brief within ten (10) days from date.

As a Stated Term, to wit: The October Term A. D. 1934, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the fifth day of November in the year of our Lord one thousand nine hundred and thirty-four.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANCIS A. GARRECHT, Circuit Judge.

[Title of Court.]

ORDER DIRECTING FILING OF OPINION AND DISSENTING OPINION AND FILING AND RECORDING OF DECREE.

By direction of the court, ORDERED that the opinion and dissenting opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the majority opinion filed.

[Title of Court and Cause.]

OPINION.

Upon Appeal from the United States District Court for the District of Oregon.

Before: WILBUR, SAWTELLE and MACK, Circuit Judges.

MACK, Circuit Judge:

Plaintiff is the owner of land on the east side of the Rogue River, a meandering nonnavigable stream in Oregon, directly opposite land on the west side, the legal title to which is in defendant City of Gold Hill; defendant Cement Company has possession of the City's land under an executory contract of purchase. Ownership in each case extends to the thread of the stream. Pursuant to its plan to build a dam and power plant on the west side of the river, Cement Company exploded charges of dynamite in reefs in the river bed but entirely west of the thread of the stream, for the purpose of permitting a freer flow of water down the west side of the river and of securing an available supply of broken rock for the construction of the dam. Plaintiff, claiming that the prosecution of these operations would divert the water from its land on the east side of the river and interfere with its rights as a riparian owner on the stream, sought an injunction to prevent defendants carrying on further blasting operations, removing the blasted rock from the bed of the stream and doing anything else that would change the bed of the stream or lessen the flow of water over plaintiff's side of the river bed. The injunction as prayed for was denied but, to ensure that some water

would continue to flow down the plaintiff's side of the stream, defendants were enjoined from reducing the surface elevation of the water at the contemplated point of diversion below 1070.056 feet above sea level. From this decree, plaintiff alone appeals.

Plaintiff's principal contentions are that by the rule of the common law a riparian owner on a non-navigable stream has a vested right to the natural flow of the stream not substantially diminished or diverted from its natural course; that this rule of "continuous flow" was part of the law of Oregon when plaintiff's lands were acquired by its predecessors from the government in 1885; and that the vested property right thus created is protected as against changes in the Oregon law by the Federal Constitution. Defendants deny that the common law rule created vested claims of continuous flow; they base their own claims on adjudicated rights and permits under the Oregon Water Code of 1909.

1. This Code establishes a comprehensive system for the adjudication of water rights; there is therein provision both for the determination of existing rights and for the acquisition of new rights. Section 11 of the Code provides: "Upon a petition to the state engineer, signed by one or more water users upon any stream, requesting the determination of the relative rights of the various claimants to the waters of that stream, it shall be the duty of the state engineer, if, upon investigation, he finds the

facts and conditions are such as to justify, to make a determination of the said rights. . . . In case suit is brought in the circuit court for the determination of rights to the use of water, the case may, in the discretion of the court, be transferred to the state engineer for determination as in this act provided." 3 Or. Code Ann. (1930) Sec. 47-601. In either case, the determination of the state engineer does not become final until confirmed by the circuit court of the county in which the determination is had. Id. Sec. 47-614. Section 45 of the Water Code provides: "Any person, association or corporation hereafter intending to acquire the right to the beneficial use of any waters shall, before commencing construction, enlargement or extension of any ditch, canal or other distributing works, or performing any work in connection with said construction, or proposed appropriation, make an application to the state engineer for a permit to make such appropriation." Id. Sec. 47-501. After the appropriation is completed, the party is entitled to a certificate of water rights, from the state engineer, like that granted after an adjudication. Id. Sec. 47-508.

In the operation of its power plant, Cement Company purposes utilizing a maximum of 1397 second feet of water. Of this amount, 295 second feet have been recognized in an adjudication under the Code; the other 1102 second feet are covered by water permits issued by the state engineer under section 45. Plaintiff, although it denies that it was a party to that adjudication and therefore bound by that de-

cree, does not contest defendant's right to use the 295 second feet. It contends, however, that that amount is now available to defendant without necessitating any change in the river bed. Defendants' permits for the other 1102 second feet, plaintiff contends, are "mere options", which cannot justify interference with the rights of other riparian owners.

The District Judge, as an alternative ground for the denial of the injunctive relief sought, relied upon plaintiff's failure to avail itself of the procedure provided by the Water Code for the determination of its rights. An invitation to further proceedings in the state courts was thought by him to be implicit in the earlier opinion of this court in a related controversy between the same parties, City of Gold Hill v. California Oregon Power Co., 35 F. (2d) 317 (1929), in which the questions now at issue were expressly reserved from decision. Cf. Pacific Livestock Co. v. Silview River Irr. Co., 200 Fed. 487 (C. C. A. 9, 1912).

The procedure established by the Water Code is in part at least administrative; it has been sustained in that aspect against constitutional attack both by the Oregon courts and the United States Supreme Court. In re Willow Creek, 74 Or. 592, 144 Pac. 505 (1914); Pacific Livestock Co. v. Lewis, 241 U. S. 440 (1916). Therefore the question arises whether or not plaintiff should have been relegated to the state tribunals on the principle that one who seeks injunctive relief in the federal courts must first exhaust the administrative remedies which the

state provides. Prentis v. Atlantic Coast Line Co., 211 U. S. 210 (1908); Porter v. Investors Syndicate, 286 U. S. 461 (1932). In both of these cases, the injunction was sought against the administrative body itself on constitutional grounds; in the instant case, the suit is between private parties and jurisdiction is based solely on diversity of citizenship. The principle of comity, which dissuades the federal court from enjoining the enforcement of state administrative determinations before they have been concluded, may be equally applicable, however, to justify a refusal to entertain a private suit which would in effect check or prevent the functioning of the administrative body. The decree of the court might in such a case conflict with adjudications by the administrative body of other water rights on the same stream and thus create just such a chaotic condition as the administrative determination of the water rights is designed to prevent.

In Oregon a suit involving water rights may be instituted in the state circuit court and in the discretion of the court, the issues may be referred to the state engineer for preliminary determination. But the circuit court, whether in reviewing the state engineer's determination or in making an original disposition of the suit, is not acting in an administrative capacity; its determination is res adjudicata as to all parties and issues properly before it. Abel v. Mack, 131 Or. 586, 283 Pac. 8 (1929); Cf. In re

Waters of Walla Walla River, 141 Or. 493, 502, 16 P. (2d) 939, 943 (1932). To compel plaintiff first to establish its rights in the circuit court of the state would therefore result in denying it entirely its right to begin proceedings in the federal courts. Cf. Railroad Commission v. Duluth Street Ry. Co., 273 U. S. 625 (1927); City Bank Co. v. Schnader, 291 U. S. 24 (1933). Whether the Circuit Court would be required to refer such a case as this to the state engineer for preliminary determination is at least doubtful. It has been reversed for failure to do so when the evidence was conflicting and the rights of those not party to the suit were likely to be affected. Oregon Lumber Co. v. East Fork Irrigation District, 80 Or. 568, 157 Pac. 963 (1916); Pacific Livestock Co. v. Balcombe, 101 Or. 233, 199 Pac. 587 (1921). But in the instant case, the rights of only the immediate parties are involved. Moreover, it is doubtful whether the administrative procedure provided by the state is adapted to the determination of such claims as those of plaintiff. The function of an adjudication under the Code is primarily to allocate definite quantities of water on the basis of prior or contemplated use. Plaintiff, however, claims the right to an indefinite quantity of water, namely the natural flow of the stream, on the basis of its riparian ownership. As the Oregon court has said:

> "By reason of the fact that the old riparian right doctrine does not provide for a fixed quantity of water to be apportioned to different persons on tracts of land, the rule * * * cannot be worked out or applied under the Water

Code of 1909 in the adjudication of the relative rights of the various claimants to the use of water of a stream system."

Re Water Rights of Hood River, 114 Ore. 112, 162, 227 Pac. 1065, 1081 (1924).*

Thus plaintiff stands on rights alleged to have become vested independently of the Water Code and the procedure thereby established. In the light of all of these considerations, we conclude that the principle that one must exhaust the administrative remedies provided by the state before seeking injunctive relief in the federal court, is inapplicable to the instant case.

2. Plaintiff contends that its right as riparian owner to have the stream continue to flow substantially undiminished in its natural channel is established by Weiss v. Oregon Iron & Steel Co., 13 Or. 496, 11 Pac. 255 (1886) and other cases. In the Weiss case, an upper riparian owner was enjoined from diverting water permanently for manufacturing purposes and thus diminishing substantially the flow of water to the lands of the plaintiff, a lower riparian owner. The court said:

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*Cf. In re Water Rights of Deschutes River & Tributaries, 134 Or. 623, 685, 703, 286 Pac. 563, 585, 294 Pac. 1049, 1051 (1930); appeal dismissed (as taken too late). Columbia-Deschutes Power Co. v. Stricklin, State Engineer, 290 U. S. 590 (1933). The valuable briefs filed therein in the Supreme Court of the United States have been examined. The appellant urged among other contentions, the constitutional objections presented by plaintiff herein.

> "The defendant, as riparian owner, has a right to the use of the stream for its own necessary uses; but this right must be reasonably exercised, and there must be no substantial diminution or waste. * * * What is a reasonable use must necessarily depend upon the facts, considering the size of the stream and the amount appropriated. But all the authorities concur that when the amount abstracted perceptibly or materially diminishes the quantity of the stream, such use of it by a riparian owner is unreasonable, and an infringement on the rights of other riparian owners, for which the law furnishes redress. The plaintiff is entitled to have the natural flow of the water, in its accustomed channel, subject only to the diminution and retardation incident to a reasonable use." 13 Or. at 500, 11 Pac. at 257.

This rule of natural or continuous flow was also applied in Cox v. Bernard, 30 Or. 53, 64 Pac. 860 (1901), and Mace v. Mace, 40 Or. 586, 67 Pac. 660, 68 Pac. 787 (1902). At the same time, however, rights acquired by appropriation while a stream was flowing through public lands were recognized as superior to riparian rights subsequently arising. Carson v. Gentner, 33 Or. 512, 52 Pac. 506 (1898); Brown v. Baker, 39 Or. 66, 65 Pac. 799 (1901). It was also said to be "established doctrine in this state that a settler upon public lands may claim the use of water either as a riparian owner or as an appropriator, but he cannot do both. The

exercise of one right is in substance the waiver of the other." Caviness v. La Grande Irr. Co., 60 Or. 410, 421, 119 Pac., 731, 735 (1911).

In Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083 (1909), the court thoroughly considered the effect on Oregon water law of the Federal Desert Land Act of Mar. 3, 1877, 19 Stat. 377, 43 U. S. C. 321. That act contained provision that ". . . all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands, and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights". This provision was interpreted as a permanent reservation and dedication to the public with the result that "all lands settled upon after the date of the latter act were accepted with the implied understanding that (except as hereinafter stated) the first to appropriate and use the water for the purposes specified in the act should have the superior right thereto". 51 Or. at 399, 98 Pac. at 1095. The exception later stated was that appropriators would not be permitted so far to deplete the flow as to deprive a riparian owner of water essential for his domestic needs. 51 Or. at 404, 98 Pac. at 1097. So long as this right of domestic use was not infringed, the riparian owner whose lands had been settled after the Act, could not object to an appropriation of water which diminished the flow of the stream.

The Oregon Water Code, adopted in 1909 after the decision in Hough v. Porter, does not specify what consideration, if any, is to be accorded in the determination of water rights to a riparian owner merely because of such ownership. Section 1 provides: "Subject to existing rights, all waters within the state may be appropriated for beneficial use as herein provided and not otherwise; but nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, corporation or association to any water." 3 Or. Code Ann. (1930) Sec. 47-404. Section 70 of the Water Code, in explanation of vested rights, provides: "(2) Actual application of water to beneficial use prior to the passage of this act by or under the authority of any riparian proprietor, or by or under authority of his or its predecessors in interest, shall be deemed to create in such riparian proprietor a vested right to the extent of the actual application to beneficial use." Id. Sec. 47-403.

These and related provisions of the Code were definitely construed in Re Water Rights of Hood River, 114 Or. 112, 227 Pac. 1065 (1924), to abolish the rule of continuous flow contended for by plaintiff in the instant case. That was an adjudication under the Code, in which the Pacific Power and Light Co. stood on its alleged right as a riparian owner to have the stream flow "undiminished by the acts or appropriations of others above its said lands other than by the reasonable use thereof by upper riparian owners for watering livestock and for domestic purposes, and by the reasonable use by such

riparian owners of the waters of such stream for the irrigation of lands actually riparian to said stream". By a four to three decision this claim was denied. Mr. Justice Bean, writing for the majority of the court, said: "The granting of the contention of the Pacific Power and Light Company and going back to the old rule of 'continuous flow' of a stream, would take the heart out of the Water Code. . . ." 114 Or. at 162, 227 Pac. at 1081. He also expressed the opinion that the common law rule under which "the riparian owner was entitled to the full flow of the stream through his land, except as the flow might be affected by a reasonable use thereof by other riparian owners", had never been adopted to the full extent in Oregon. As to this, however, a majority of the Court disagreed with him. Nevertheless, a majority held that the Water Code in any event had abolished the rule of continuous flow as to lands acquired before as well as those acquired after its adoption, and that the provision therein saving vested rights was limited to rights acquired through "actual application of water to beneficial use", as defined in Section 70. A minority, on the other hand, were of the opinion that the Code could, and to avoid constitutional difficulties, should be interpreted so as to preserve as vested rights, the riparian rights of proprietors of lands which had passed into private hands while the rule of continuous flow prevailed in Oregon.

3. The Hood River case as well as Norwood v. Eastern Oregon Land Co., 112 Or. 106, 227 Pac.

1111, decided on the same day, involved lands which passed from the government prior to the Desert Land Act of 1877. In the instant case, plaintiff's rights date back only to 1885, the date of the government patent on which its title is based. We come, therefore, to the question of the interpretation of that act and primarily to the consideration of Hough v. Porter, supra.

The Desert Land Act was passed for the purpose of facilitating the settlement of the public domain arid land by permitting title to be acquired thereto by one who declared his intention of reclaiming it and who completed the reclamation within the prescribed period. The right to the use of water by one so conducting it upon desert land is limited to the "amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation"; then follows the provision relied on in Hough v. Porter that "all surplus water . . . together with the waters of all lakes, rivers, and other sources of water supply on the public lands shall remain and be held free for the appropriation and use of the public . . .". Of this provision, the court in Hough v. Porter said:

> "This reservation of water rights for the benefit of the public was clearly not essential to any of the other provisions of the act. The previous statement contained sufficient to define and protect the rights of those selecting lands under the desert land act; but the added proviso, or something of similar import, was

> essential to the establishment of a clear and uniform rule upon the subject as regards all appropriations thereafter to be made from streams or other bodies of water upon the public lands and to which such might be riparian. The words 'shall remain and be held free for the appropriation and use of the public for irrigation,' etc., are clearly words of reservation and dedication, and obviously so intended." 51 Or. at 386, 98 Pac. at 1091.

This reservation and dedication, it was concluded, had the effect of permanently severing from the lands then owned by the government and subsequently granted by it, the right which the riparian owner might otherwise have, to object to an appropriation of water not already put to a beneficial use.

Both the reasoning and the result of Hough v. Porter have been unqualifiedly adopted by the Supreme Court of South Dakota in Cook v. Evans, 45 S. D. 31, 185 N. W. 262 (1922), and Haaser v. Englebrecht, 45 S. D. 143, 186 N. W. 572 (1922); and the grounds of the decision were termed "plausible" in Boquillas Land & Cattle Co. v. Curtis, 213 U. S. 339, 344 (1909), a case from the Supreme Court of Arizona, in which the question was raised but not decided.

In Washington and in California, however, a narrower interpretation of the Desert Land Act has been adopted. In Still v. Palouse Irr. & Power Co., 64 Wash. 606, 117 Pac. 466 (1911), lower riparian

owners successfully objected to an upper riparian owner so impounding the water as materially to alter the natural flow of the stream by and through the plaintiffs' land. The contention that the plaintiffs had no riparian right to the natural flow, as against an actual appropriation by defendant because their lands were acquired from the government after the Act of 1877, was denied on the grounds that the plaintiffs' lands were not acquired under, even though after, that Act and that no valid and existing appropriation of water had been made by defendant or its predecessors prior to the vesting of plaintiffs' riparian rights. See, too, Bernot v. Morrison, 81 Wash. 538, 559, 143 Pac. 104, 111 (1914). In San Joaquin & Kings River Canal & Irr. Co. v. Worswick, 187 Cal. 674, 203 Pac. 999 (1922), the plaintiffs contended that their rights of appropriation were superior to the defendants' right as upper riparian owners to use the waters of the stream, because the defendants' lands were acquired from the government after 1877. In disposing of this contention the California Court said:

> "It is obvious from the framework and language of the act of 1877 that it was not intended to apply to all the public lands of the United States. Its main purpose was to provide for the sale of desert lands which could be reclaimed by bringing water thereon. It may be true that as to such lands the purpose was to divert the riparian rights in the waters existing thereon and devote the same to the public uses stated. We do not think that question is in-

volved in the present case, and we need not express any opinion on it. There is nothing in the act which justified giving that particular part thereof so wide an application as to embrace all lands of the United States, wherever situated. The plaintiffs do not claim that any of the land belonging to the defendants was purchased or acquired under the Desert Land Act, and there is no finding that in fact such lands were desert lands. * * * It follows from what we have said that the rights of the plaintiffs under their appropriations are not affected by the provisions of the Desert Land Act." 187 Cal. at 690, 203 Pac. at 1007.

In these decisions, Washington and California do not limit the right of appropriation to desert lands, recognizing that appropriations of water running through any public lands, whether desert lands or not, may be entitled to priority over subsequently acquired riparian rights. The California and Washington rule does, however, limit the application of the reservation provision of the Act to lands acquired thereunder, insofar as, if at all, the effect of the Act is permanently to subordinate to the right of appropriation the riparian rights in lands then owned and subsequently granted by the government.

The legislative history of the Desert Land Act as found in Cong. Rec. 44th Cong. 2nd session, V. 5, pt. 3, pp. 1961, 1964-1974, 2225, comports better with the narrow interpretation accorded it by Washington and California than with the broad interpre-

tation of Hough v. Porter. By the Act of 1866, Congress had already provided that rights to the use of water upon public lands, acquired by appropriation and recognized by "the local customs, laws and the decisions of courts", should be maintained and protected. R. S., Sec. 2339, 43 U. S. C., sec. 661. By the act of 1870, it was further provided that all patients granted or preemption or homesteads allowed should be subject to any vested and accrued water rights acquired under or recognized by the Act of 1886. R. S., sec. 2340, 43 U. S. C., sec. 661. Of this legislation, a distinguished writer says:

> "The Act of 1866 gave the formal sanction of the United States to the prevailing theory of a grant to the holders of existing rights upon public land, which indeed was its primary object; for the statute had in view chiefly appropriations already made rather than future ones, and the protection of existing rights on public land against the United States itself (by the Act of 1866) and against its later riparian patentees (by the enactment of 1870) was the primary object. * * *
>
> "It further provided the same method for acquiring water rights on public land in the future; a vindication of the existing system for the future as well as for the past; . . . * * *
>
> "But as we proceed we must remember that it was wholly public land law, involving solely

> rights in the unoccupied public domain. * * *"
> 1 Wiel, Water Rights in the Western States (3d Ed. 1911) 116.

The Desert Land Act as originally reported to the Senate by the Committee on Public Lands, did not contain the provision limiting the right to the use of water by one acquiring under the Act, to the amount needed for reclamation and reserving all surplus water and other waters on the public domain to the use of the public. Indeed the Committee expressed the belief that no further legislation was necessary to regulate the use of water for purposes of irrigation. The provision now in question originated as an amendment offered on the floor of the Senate for the avowed purpose of preventing one who should acquire his lands under the Act, from securing a monopoly over more water than was reasonably required for his own tract; it was modified in the course of debate to avoid the suggested possibility of conflicting with the Act of 1866. Nevertheless, the Act of 1877, literally interpreted, goes further than the previous legislation, in that it reserves to the public the right of appropriating water on all public lands regardless of whether or not such a right is recognized by "local customs, laws, and decisions of courts". But neither the language nor the history of the Act, fairly interpreted, supports the holding in Hough v. Porter that appropriations made after the government had parted with its title to the land outrank the riparian rights which state law would

otherwise attach to government grants other than those under the Desert Land Act itself.

Furthermore, the interpretation of the Desert Land Act in Hough v. Porter is inconsistent with the general doctrine that each state "may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of water for the purposes of irrigation shall control. Congress cannot enforce either rule upon any state". Kansas v. Colorado, 206 U. S. 46, 94 (1907); see, too, United States v. Rio Grande Irr. Co., 174 U. S. 690, 702 (1899); United States v. Central Stockholder's Corp. of Vallejo, 52 F. (2d) 322, 329 (C. C. A. 9, 1931); 2 Kinney, Water Rights (2d ed. 1902), sec. 817.

Whether or not the riparian rights of owners of land acquired from the government under the Desert Land Act itself are affected by the Act we need not consider, since there is no suggestion that plaintiff's lands were so acquired. We conclude that the Desert Act of 1877 did not require the State of Oregon to abandon the rule of "continuous flow" as to all riparian lands in that state settled on and patented after its enactment.

Whether Hough v. Porter should be deemed an authoritative determination of Oregon law as to the relative rights of appropriators and riparian owners of such lands, notwithstanding what we deem to be the erroneous reasons on which alone it is based, and if so, whether it should be followed

in the federal courts although involving a change of the common law in force in 1885, the date of the government patent, by court decision rendered in 1909, we need not decide, if the Hood River case and the Water Code of 1909 can withstand plaintiff's attacks on constitutional grounds.

4. We proceed then to a consideration of plaintiff's principal contention, that the riparian right to the continuous flow of the stream is a property right which became vested in its predecessors and was passed on to it, and that to deprive it thereof either by legislation or by judicial decision would violate its federal constitutional rights. Clearly riparian rights are substantial property rights which may not be arbitrarily destroyed; they may be taken, for example, under the laws of Oregon and of other states in eminent domain proceedings. Or. Laws 1891, p. 52, sec. 8; Umatilla Irrigation Co. v. Barnhart, 22 Or. 389, 30 Pac. 37 (1892), Mansfield v. Balliett, 65 Ohio St. 451 (1902); St. Helena Water Co. v. Forbes, 62 Cal. 182 (1882). Like other property, however, riparian rights are subject to the police power of the state and within reasonable limits may be modified by legislation passed in the interest of the general welfare.

In several western states where the common law rule of riparian rights was first adopted and then wholly or partly abandoned for the doctrine of appropriation, the question of the extent to which existing riparian rights may be and are thereby

affected has been considered. In Clark v. Cambridge & A. Irr. & Imp. Co., 45 Neb. 798, 64 N. W. 239 (1895), the plaintiff, a lower riparian owner, sought to enjoin interference with his use of the stream for power purposes by the defendant which claimed a right of appropriation under the Irrigation Act of 1889; this act provided: "The right to the use of running water flowing in a river, . . . may be acquired by appropriation by any person . . . provided that in all streams not more than twenty feet in width, the rights of riparian proprietors are not affected by the provisions of this act." Although the stream in question exceeded twenty feet in width the statute was held to be ineffective to impair the plaintiff's riparian rights, because, "assuming such to have been the intention of the legislature, it is a clear invasion of private rights, and within the prohibition of the constitution". In Crawford Co. v. Hathaway, 67 Neb. 325, 343, 93 N. W. 781, 787 (1903), other irrigation statutes of the state were construed to authorize the condemnation of riparian water rights but not otherwise to impair them, because "the rights of riparian proprietors to the use of the waters flowing in the stream to which their lands are adjacent when once attached, is a vested right of property, . . . of which the owners cannot rightfully be deprived or divested except by grant, prescription, or condemnation, with compensation by some of the means and methods recognized by law for the taking or damaging of private property for public use".

A similar construction was applied on like grounds to the Kansas statutes, permitting water to be appropriated for purposes of irrigation, in Clark v. Allaman, 71 Kan. 206, 80 Pac. 57 (1905), and to Texas appropriation statutes in McGhee Irrigating Ditch Co. v. Hudson, 85 Tex. 587, 591, 22 S. W. 398, 967 (1893). See, too, Barrett v. Metcalfe, 12 Tex. Civ. App. 247, 33 S. W. 758 (1896).

In St. Germain Irrigating Co. v. Hawthorn Ditch Co., 32 S. D. 60, 143 N. W. 125 (1913), in a suit by one claiming as an appropriator under the statute against several defendants, some of whom claimed the right to use the water of the stream as riparian owners, it was held that a statute requiring any one seeking to make a beneficial use of water, to secure a permit from the state engineer, was invalid as to riparian proprietors, because it conflicted with the state constitutional provisions protecting private property. The court said:

> "The right of a riparian owner to make a reasonable beneficial use of the waters of a flowing stream for domestic and irrigation purposes is a vested property right and is entitled to protection to the same extent as property rights generally".

It should be noted that the riparian right of which the court is speaking in this case is the affirmative right to use the water for certain purposes not the right to prevent others from diverting it.

In Nielson v. Sponer, 46 Wash. 14, 89 Pac. 155

(1907), a statute providing that "the person upon whose lands the seepage of spring waters first rise shall have a prior right to such waters, if capable of being used upon his lands", did not justify an upper riparian owned upon whose lands a stream so originated, in using up the water for irrigation so as to prevent its use for ordinary domestic purposes by lower riparian owners whose lands had been patented before the statute.

In Boquillas Land & Cattle Co. v. Curtis, 11 Ariz. 128, 89 Pac. 504 (1907), the plaintiff, relying upon its common law riparian rights, sought to enjoin the defendants from entering upon its land for the purpose of reconstructing a dam and diverting water in accordance with an appropriation made before the plaintiff had made any use of the water of the stream. The first legislature of the Territory of Arizona had provided in 1864, that "the common law of England so far as it is not repugnant to or inconsistent with the Constitution and laws of the United States or the Bill of Rights or the laws of this territory is hereby adopted and shall be the rule of decision in the courts of this territory". The Bill of Rights, however, provided: 'All streams, lakes, and ponds of water capable of being used for the purpose of navigation or irrigation are hereby declared to be public property, . . .' In 1887, the legislature enacted that "the common law doctrine of riparian water rights shall not obtain or be of any force or effect in this territory". The Supreme Court of Arizona denied plaintiff's claim of ripa-

rian right on the alternative grounds that the common law doctrine of riparian rights had never applied in the Territory of Arizona, and that "where the legislature has, subject to future legislation, conferred rights to the use of water from flowing streams upon riparian owners, the latter cannot be said to be vested in such a sense as that they may not be subsequently abrogated by statute; at any rate when the riparian owner has made no use of the water permitted him at common law". The Supreme Court, 213 U. S. 339 (1909), in affirming the state court, rested the decision entirely on the first ground and did not consider the contention that the Act of 1887, as interpreted by the Arizona court, deprived the plaintiff of property without due process of law.

When states which recognize the doctrine of prior appropriation, adopt a system for the administrative determination of water rights, the question has been raised whether or not the new system applies to water rights theretofore acquired. In Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. 258 (1900), the contention that the declaration in the Constitution of Wyoming that all natural waters were the property of the state and the provisions of the Water Act of 1890 establishing a Board of Control for the adjudication of water rights, could not validly be so applied, was overruled; the court said:

> "Where various rights are connected with the same stream or body of water, a subsequent

claim cannot be successfully regulated without including in the regulations all rights. The water to which the use of each attaches is public, and the people as a whole are intensely interested in its economical, orderly, and inexpensive distribution". See, too, Ormsby County v. Kearney, 37 Nev. 314, 142 Pac. 803 (1914); Humboldt Land & Cattle Co. v. Allen, 14 F. (2d) 650, 654 (D. C. Nev., 1926), aff. 274 U. S. 711 (1927).

Despite the emphasis in some state decisions on the necessity of preserving riparian rights from impairment by judicial or legislative action, it cannot be doubted that in the course of the development of western water law, previously recognized riparian rights have been subjected to various modifications by legislative and by judicial action. After holding in Vansickle v. Haine, 7 Nev. 249, (1872), that the legislative adoption of the common law included the common law doctrine of riparian rights, the court overruled this decision and in Jones v. Adams, 19 Nev. 78, 6 Pac. 442 (1885), adopted the rule of prior appropriation. See, too, Reno Smelting, Milling & Reduction Works v. Stevenson, 20 Nev. 269, 21 Pac. 317 (1889). In Brown v. Chase, 125 Wash. 542, 217 Pac. 23 (1923), the court, departing from earlier general expressions in its opinions, held that a riparian owner was not entitled as against an appropriator, to the undimin-

ished flow of the stream if that flow was not of substantial benefit to him, it said:

> "... while this court has recognized the common law riparian rights, it has also modified and enlarged upon that doctrine by ingrafting upon it the necessity of beneficial use by the riparian owner, refusing relief where the riparian owner was not substantially damaged, and granting relief where he was either presently or prospectively damaged."

And in Proctor v. Sim, 134 Wash. 606, 236 Pac. 114, 117 (1925), the same court said:

> "For years past the trend of our decisions and the tenor of our legislation have been to restrict and narrow the common law of riparian rights ...";

in harmony with that development, the provision of the 1917 Water Code of that state, saving "the existing rights of any riparian owner" was construed to protect only "the right to the beneficial use of such portions of the waters of the lake as are either directly or prospectively, within a reasonable time, proper and necessary for the irrigation of their lands and for the usual domestic purposes". For other instances of judicial modification of riparian rights see the opinion of Judge Coshow in the Hood River case, 114 Or. at 193, 227 Pac. at 1091.

In California, it has often been emphasized that riparian rights are substantial property rights which cannot arbitrarily be impaired or destroyed. It is

recognized, however, that like other property rights, they are subject to the police power of the state and may be modified within reasonable limits when the general welfare requires.*

In Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 Pac. 607 (1926), the court sustained the right of plaintiffs, lower riparian owners, to prevent defendants, upper riparian owners, from impounding the waters of the stream so as to deprive the plaintiffs of the benefits of annually recurring floods and freshets. In conformity with Palmer v. Railroad Commission, 167 Cal. 163, 138 Pac. 997 (1914), and San Bernardino v. Riverside, 186 Cal. 7, 198 Pac. 784 (1921), the court held that the defendant's right of appropriation under the Civil Code, secs. 1410-1422, was subordinate to prior vested riparian rights in the natural flow of the stream. The defendant also contended that the plaintiff's riparian rights were limited by sections 11 and 42 of the Water Commission Act of 1913, which declared that all waters not applied to a "useful and beneficial purpose" or reasonably needed for such purposes were subject to appropriation in accord-

*For valuable discussions of present problems of California water law see Bingham, Some Suggestions concerning the California Law of Riparian Rights (1934) 22 Cal. L. Rev. 251, and Comment (1934) 22 Cal. L. Rev. 333. For earlier discussions see Wiel, Pending Water Amendment to California Constitution and Possible Legislation (1928) 16 Cal. L. Rev. 170, 257; Treadwell, Modernizing the Water Law (1928) 17 Cal. L. Rev. 1.

ance with the provisions of the act, and that the term "useful or beneficial purposes" should not "be construed to mean the use in any one year of more than two and one-half acre feet of water per acre in the irrigation of uncultivated areas of land, . . ." The court held section 11 inapplicable because the flood waters were beneficial to the plaintiffs and held the limitation in section 42 to two and one-half acre feet invalid on the ground that to allow the legislature to determine the extent to which riparian owners could claim the beneficial use of water "would be to concede to the legislative department of the state government the arbitrary power to destroy vested rights in private property of every kind and character". To this holding, however, the Court added the qualifications:

> "* * * If the state were here essaying to uphold an effort on its part to work out impartially, unselfishly and in the interests of the whole people some general plan or system for the equitable adjustment of rights and uses in its flowing streams with a view to the conservation, development, and distribution of the dynamic forces and generative and fertilizing fructibilities of their waters, it might well be argued that public policy, public interest, and a most liberal interpretation of the police powers of the state might rightfully be invoked in support of such an effort." 200 Cal. at 120, 252 Pac. at 623.

Justice Shenk dissented on the ground that sections 11 and 42 constituted valid regulations in the in-

terest of the conservation of the waters of the state and that under those sections, a wasteful use of water by a riparian owner could not prevent a reasonable use by an appropriator.

In Fall River Valley Irr. Dist. v. Mt. Shasta Power Corp., 202 Cal. 56, 259 Pac. 444 (1927), the plaintiff, seeking to establish that its right of appropriation under the Act of 1913 was superior to the riparian right of the defendant who was already using the flow of the stream for power purposes, contended that the Act of 1913 was an exercise of the police power of the state which justified such a subordination of riparian rights. As to this, the court said:

> "We need here only say that the legislative department of the state may not take any portion of a vested property right from one person and invest another with it and be justified in so doing, in view of the provision of sections 13 and 14 of article 1 of the State Constitution and the Fourteenth Amendment of the United States."

But again the court added the qualification:

> "We are by no means intending to say that riparian rights may not under proper circumstances yield to the police power in the interest of public health, safety, comfort, or welfare, but the Act of June 16, 1913, does not purport to be an exercise of such power for any purpose nor do the facts in the present case give rise

to a situation where the police power may operate." 202 Cal. at 67, 68, 259 Pac. at 449.

Justice Shenk concurred in the decision, on the ground that the waters of the river had already been applied to a beneficial use by defendant and others before the application of plaintiff's predecessor in interest, but dissented from the court's assumption that the Water Commission Act of 1913 had not, as an exercise of the police power, effected a modification of riparian rights.

Finally, in Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 22 Pac. (2d) 5 (1933), the plaintiffs, riparian owners, sought to prevent defendants from impounding and diverting, under their claimed right of appropriation, water from the water shed of the Santa Ynez River above plaintiff's lands. The decision of the lower court denying the relief prayed, was affirmed primarily on the ground that the defendants disclaimed any intention of impounding the ordinary flow of the river, but limited themselves and were also limited by the decree to the right of impounding storm waters in excess of the ordinary and usual flow. Plaintiff, however, also urged that as against a non-riparian appropriator, a riparian owner was entitled to insist upon the undiminished flow of the stream, no matter how slight both the benefit of such flow and the damage of the threatened diversion might be. The court, conceding that this was a fair statement of the effect of the previous California decisions, held that this rule had been modified by a constitutional amend-

ment,* adopted in 1928, after the Herminghaus and Fall River cases, and that, in consequence, the rule of reasonable use now applied as between riparian owner and non-riparian appropriator. To the contention that the Amendment so interpreted was a violation of the state and federal constitutional guaranties against deprivation of property without compensation, the court answered:

> "It was because this court felt impelled to adhere to the long-established rule of Lux v. Haggin, that a constitutional amendment was made necessary. * * *"

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*California Constitution, art. 14, sec. 3:

"It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are,

"* * * There is a well recognized and established distinction between a 'taking' or 'damaging' for public use and the regulation of the use and enjoyment of a property right for the public benefit. The former falls within the realm of eminent domain, and the latter within the sphere of the police power. That the constitutional amendment now under consideration is a legitimate exercise of the police power of the state cannot be questioned. It is the highest and most solemn expression of the people of the state in behalf of the general welfare. The present and future wellbeing and prosperity of the state depend upon the conservation of its lifegiving waters. * * *

"* * * The conservation of other natural resources are of importance, but the conservation of the waters of the state is of transcendent importance. Its waters are the very life blood of its existence. The police power is an attribute of sovereignty and is founded on the duty of the state to protect its citizens and provide for

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or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

the safety, good order, and wellbeing of society. It is co-extensive with the right of self-preservation in the individual. * * *

"In its inception the police power was closely concerned with the preservation of the public peace, safety, morals, and health, without specific regard to the general welfare. Under modern conditions it includes the general welfare which embraces regulations 'to promote the economic welfare, public convenience, and general prosperity of the community.' Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592. . . . * * *

"* * * As already observed the amendment purports only to regulate the use and enjoyment of a property right for the public benefit, for which reason the vested right theory cannot stand in the way of the operation of the amendment as a police measure. A vested right cannot be asserted against it because of conditions once obtaining. * * *

* * * * * * *

"There is nothing novel about the limitation of the riparian right to a reasonable, beneficial use of water. Other western states which first adopted the common-law doctrine of riparian rights have effectually changed it to meet modern conditions.

* * * * * * *

"Oregon in 1909 checked the extension of the old common-law doctrine of riparian rights, recognizing, however, certain rights secured

> prior to 1877. Hough v. Porter, 51 Or. 318, 95 P. 732, 98 P. 1083, 102 P. 728. Thereafter the Legislature adopted a water code limiting the riparian owner to a reasonable beneficial use. The code was upheld. In re Willow Creek, 74 Or. 592, 144 P. 505, 146 P. 475. Its constitutionality was again affirmed in re Hood River, 114 Or. 112, 227 P. 1065." 217 Cal. at 700-704, 22 Pac. (2d) at 16, 17.

It has long been generally recognized that the establishment of an administrative system for the regulation and determination of water rights, such as that adopted by Oregon Water Code of 1909, is a legitimate exercise of the police power of the State. 2 Wiel, Water Rights in Western States (3d ed. 1911) §1184, p. 1097; Freund, Police Power (1904) §§414-417. The intensity of the public interest involved is indicated by the provisions in the constitutions and statutes of western states declaring the waters of natural streams and lakes to be the property of the public or of the state. Colorado Constitution, art. XVI, sec. 5; Wyoming Constitution, art. VII, sec. 1; Utah Rev. Stats. (1933) sec. 100-1-1, Nev. Comp. Laws (1929) sec. 7890; Neb. Comp. Stat. (1929) sec. 46-502; 3 Or. Code Ann. (1930) sec. 47-401; see Lasky, From Prior Appropriation to Economic Distribution of Water by the State—Via Irrigation Administration (1929) 1 Rocky Mt. L. Rev. 161, 174-187. The Oregon Code of 1909 itself purported to be an exercise of the police power of the state as shown by Section 74:

"Emergency.—Whereas, there is great uncertainty existing throughout the State with reference to the water rights of various parties along the streams, ditches and waterways as to their several interests therein, entailing expensive litigation and engendering many animosities and much bad blood, thereby endangering the public peace and safety of many sections of the State, and Whereas, it is urgent that these conditions be remedied for the preservation of the public peace, health and safety of the State, this act shall be in full force and effect from and after its approval by the Governor."

For a similar emphasis upon the peace of the community as one of the purposes to be achieved by water regulation, see White v. Reservoir Co., 22 Colo. 191, 197, 43 Pac. 1028, 1030 (1896).

The question is whether or not the modification of riparian rights effected by the Statute of 1909, as construed by the Court in the Hood River case could reasonably be regarded as essential to the accomplishment of the ends sought to be achieved by such legislation. That those ends may properly include the economic welfare of the community, as well as its peace, health and safety is, of course, well established. Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398, 436, 437 (1934). It cannot be doubted that the economic welfare of the people of Oregon was one of the principal aims sought to be promoted by the Water Code of 1909. Some of the most fully developed parts of the state, notably the

Hood River valley east of the Cascade Mountains, the Rogue River Valley, and the valley of the Umpqua River are said to owe their development as fruit raising districts entirely to irrigation. See p. 58 of Brief on merits filed by the Attorney General of Oregon in the Supreme Court in Columbia-Deschutes Power Co. v. Stricklin, supra. We have the emphatic word of the majority of the Oregon Court that modification of riparian rights was necessary to the effectuation of that purpose and that the preservation of such a right as plaintiff is claiming would "take the heart out of the Water Code". This judgment of the state court, familiar as it is with the local conditions that called forth this legislation, is in itself entitled to great respect as evidence of the reasonableness and necessity of such interference with private rights. See Welch v. Swasey, 214 U. S. 91, 105, 106 (1909); Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 365 (1909). It also serves to distinguish the present case from cases hereinabove cited, in which the state court either construed the statute as inapplicable to riparian rights theretofore acquired, or held it unconstitutional as so applied. In those states, the need for a complete change in the water law may have been deemed less exigent.

Under the common law, the right of the riparian owner is to the usufruct of the water and not to the water itself. Legislation limiting the right to its use is in itself no more objectionable than legislation forbidding the use of real property for certain

purposes. Euclid v. Ambler Realty Co., 272 U. S. 365 (1926); Gorieb v. Fox, 274 U. S. 603 (1927); see, too, Marblehead Land Co. v. City of Los Angeles, 47 F. (2d) 528 (C. C. A. 9, 1931). To argue, as plaintiff does, that riparian rights are real property rights which attach to the land, does not put such rights beyond the reach of the police power. Chicago & Alton R. R. v. Tranbarger, 238 U. S. 67 (1915), see Block v. Hirsch, 256 U. S. 135, 155 (1920). This is not a case where a right of action had accrued on the basis of the previous law before it was superseded by the legislation under attack. Cf. Ettor v. Tacoma, 228 U. S. 148 (1913); Forbes Boat Line v. Board of Commrs., 258 U. S. 338 (1922). That the common law rights to the relative use of certain natural resources may be modified in the interest of securing fairer distribution thereof as well as of preventing physical or economic waste is established by Champlin Refining Co. v. Corp. Commission of Okla., 286 U. S. 210 (1931) and cases cited therein at p. 234. See, too, F. C. Henderson v. R. R. Comm. of Tex., 56 F. (2d) 218 (W. D. Tex. 1932).

In Hudson Water Co. v. McCarter, 209 U. S. 349 (1908), the right of a state, in the exercise of its police power, to modify existing riparian rights has been even more explicitly established. The Attorney General of the State of New Jersey filed an information in the State Court to enjoin the defendant from carrying waters of the Passaic River out of the state, contrary to a prohibitory statute.

Defendant contended that the statute violated its right as a riparian owner to divert whatever water it desired from the stream in as much as there were no objecting riparian interests below. The New Jersey court sustained an injunction on the ground that the common law recognized no such riparian right and that the State of New Jersey itself had a proprietary interest in the stream giving it the right to object to the diversion. 70 N. J. Eq. 695. Expressly disclaiming any intention of casting doubt upon the ground of the state court's decision, the Supreme Court stated that it preferred to rest its affirmance upon the broader ground of the police power of the state. Mr. Justice Holmes said:

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings, in a city, without compensation. To that extent it

cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.

"* * * But it is recognized that the State as Quasi-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. * * *

"The problems of irrigation have no place here. Leaving them on one side, it appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the

> cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that apart from statute those rights do not go to the height of what the defendant seeks to do, the result is the same."

The modification of riparian rights which the Act of 1909 has effectuated is not so drastic a change as to amount to taking of property without due process of law. See Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 415 (1922). At common law, the usufruct of the riparian owner was not absolute; it was conditioned on the equal right of every other riparian owner to the use of the water. By the Oregon legislation, his usufructuary privileges were not destroyed; his right of access to and to the equal use of the waters for ordinary domestic purposes were preserved. Re Water Rights of Hood River, 114 Or. at 190, 227 Pac. at 1089. This legislation, however, has changed the conditions under which the riparian owner's privilege otherwise to use the water may be exercised. On the one hand, his unrestricted right reasonably to use his fair share of the waters for beneficial purposes is now subordinated to a prior appropriation for beneficial purposes. On the other hand, he is no longer limited in such beneficial use to his fair proportion of the waters over and above those needed for domestic purposes by all riparian owners; and as a riparian owner, he is in a peculiarly advantageous position to exercise the right of appropriation. The statute can-

not be said to take away property from one in order to give it to another, even though the effect of the operation of the statute in a specific case may be so to transfer the privilege of making some specific use of the water.

We conclude then, that the riparian owner's right to the natural flow of the stream substantially undiminished has been validly abrogated by the Water Code of 1909 as construed by the Oregon court. Plaintiff's assertion of such a right in this case cannot, therefore, be sustained.

5. The record does not justify us in differing with the district judge who deemed that the injunction as granted would suffice to preserve plaintiff's access to the water and its enjoyment of "the residual rights guaranteed by the modified riparian right doctrine". Plaintiff asserts that the chief value of its lands, due to their location, lies in their availability for power purposes, and that they cannot be so utilized if defendant be permitted to consummate its alleged wrongful acts. Any loss of this value would, however, be damnum absque injuria; it would be due to defendants' forehandedness in obtaining the certificates and permits that give them priority in putting the waters of the river to a beneficial use.

It is not clearly apparent whether plaintiff claims that removal of the rock blasted and to be blasted either of itself or combined with the maximum operation of the plant will cause such a diversion as substantially and permanently to move the thread of the stream toward defendant's land or will cause

only an intermittent change dependent upon defendant's actual operations of its proposed plant and the stage of the river. In either case, however, plaintiff has no legal cause for complaint or for further injunctive relief, even though, if such change were permanent, it would alter the relation of plaintiff's western boundary line to the thread of the river. While with a gradual change, the thread of the river continues to be the boundary line between opposite riparian owners, with a sudden and apparently permanent change, the boundary remains as theretofore, that is, at the line of the thread of the former main channel and not at the thread of the new channel. Wyckoff v. Mayfield, 130 Or. 687, 280 Pac. 340 (1929). The riparian owner has no legal right in Oregon to the continuance of the thread of the stream as his boundary.

Defendants' proposed diversion of the water, pursuant to the certificates and permits of appropriation for beneficial purposes and the blasting on and removal of the rock from their own part of the river bed in the accomplishment of this purpose, will violate none of plaintiff's rights, provided defendants maintain the water level prescribed in the injunction as granted. If plaintiff's fears that defendants, in the operation of the power plant, will violate the injunction to its damage, should be realized, the remedy that will give plaintiff full protection is readily available. Such fears justify neither a reversal nor a modification of the degree.

Decree affirmed.

[Title of Cause.]

WILBUR, Circuit Judge, dissenting;

I concur in that portion of the main opinion which construes the Desert Land Act of March 3, 1877 (19 Stat. 377, 43 U. S. C. A. §321).

The main opinion relies largely on the Hood River case, 114 Ore. 112, adjudicating the rights of claimants to water in the Hood River of Oregon. This case dealt with the power rights of the Pacific Power & Light Company. The court held that the Pacific Power & Light Company, although the owner of riparian land on both banks of the Hood River was not entitled to the undiminished flow of the river through their land under the law of Oregon, and that the common law doctrine of riparian rights was to that extent inapplicable to the conditions in Oregon. The court also held that the Pacific Power & Light Company had no right to power by reason of its riparian ownership because it had not used the power prior to the enactment of the water code of 1909. As the decision in the main opinion is based very largely upon the decision of the Supreme Court of Oregon in the Hood River case I proceed to state the reasons why I agree with the first conclusion of the Supreme Court of Oregon, and of the majority of the court in the case at bar, in holding that the right of the riparian owner to an undiminished flow of water through his land in order that he might use the same for the development of power, is subordinate to the right of those

who have appropriated water for irrigation purposes above the land in question. I will follow this discussion by a statement of the reasons why I disagree with the conclusion of the majority in the case at bar holding that the riparian right of the appellant is subordinate to the claim of appropriation of water for power purposes made subsequent to the grant of appellant's riparian right to use the water for power purposes.

As pointed out by the Supreme Court of Oregon in the Hood River case, to hold that the common law doctrine of the right of riparian owners to the full and undiminished flow of the stream is applicable, would prevent the use of water for irrigation because of any use of water for irrigation necessarily diminishes the flow of the stream below the point of diversion. As pointed out by Judge Bean, the author of the majority opinion in the Hood River case:

> "[23, 24] The very essence of the common law is flexibility and adaptability. It does not consist of fixed rules, but is the best product of human reason applied to the premises of the ordinary and extraordinary conditions of life, as from time to time they are brought before the courts. Although the common law is homogeneous, yet it finds widely different expression in different jurisdictions. If the common law should become so crystallized that its expression must take on the same form wherever the com-

mon law system prevails, irrespective of physical, social, or other conditions peculiar to the locality, it would cease to be the common law of history, and would be an inelastic and arbitrary code. It is one of the established principles of the common law, which has been carried along with its growth, that precedents must yield to the reason of different or modified conditions."

A good illustration of this rule of adaptation is in the Town of Antioch v. Williams Irr. Dist., 188 Cal. 451, 462, 465, where Chief Justice Shaw, speaking for the court said:

"In this state the climate, the original ownership of the land, the policy of the governments of the United States and the state, the original owners, regarding the use and occupancy thereof for mining purposes by persons not in privity with them, and the necessity of water for placer mining and irrigation, are all so different from the conditions existing in Great Britain, where the common law had its origin, that the court from the first has had some difficulty in applying it here without producing the injustice or wrong which it is the chief purpose of the common law to prevent or redress. It has frequently been necessary to invoke the maxim of jurisprudence that 'where the reason of a rule ceases, so should the rule itself,' and this maxim has been incorporated

into the Civil Code. (§3510) It is as much a part of the common law as are the rules concerning the right of appropriation of water."

p. 465:

"Similar unprecedented conditions were presented in Katz v. Walkinshaw, 141 Cal. 116 (99 Am. St. Rep. 35, 64 L. R. A. 236, 70 Pac. 633, 74 Pac. 766), and the numerous cases following it. It was there said that 'whenever it is found, that, owing to the physical features and character of this state, and the peculiarities of its climate, soil, and productions, the application of a given common law rule by our courts tends constantly to cause injustice and wrong, rather than the administration of justice and right, then the fundamental principles of right and justice on which that law is founded, and which its administration is intended to promote, require that a different rule should be adopted'."

If a court can apply the rule of reason in defining the rights of a riparian owner, and declare that changed conditions demand a change in the rights of a riparian owner, it would seem to follow that the legislative branch of the government could also declare and define the rights of a riparian owner so long, and, I think, only so long as the legislation is a reasonable adaptation of the common law rule to the conditions obtaining in the state, assuming of course that the state has followed the common law

in defining the rights of riparian owners. In Shively v. Bowlby, 152 U. S. 1, (38 L. Ed. 331, 350, 14 Sup. Ct. Rep. 548, see also Rose's U. S. Notes), Justice Gray, speaking for the court, said:

> "The settlers of Oregon, like the colonists of the Atlantic States, coming from a country in which the common law prevailed to one that had no organized government, took with them, as their birthright, the principles of the common law, so far as suited to their condition in their new home. The jurisprudence of Oregon, therefore, is based on the common law." See also Lytle v. Hulen, 128 Or. 483, 510.

The common law doctrine of riparian rights was fully and completely adopted by legislation (Territorial Act, June 7, 1844, Laws of Oregon 1843-1849, p. 100, and by its Constitution, Art. 18, Sec. 7, and by judicial decisions of the state of Oregon, as will appear by the following quotation from the decisions of the Supreme Court of Oregon and from our own decisions. In United States F. & G. Co. v. Bramwell, 108 Or. 261, 217 Pac. 332, the Supreme Court of Oregon said:

> "The common law of England, modified and amended by English statutes, as it existed at the time of the American Revolution, as far as it was general and not local in its nature and applicable to the conditions of the people and not incompatible with the nature of our polit-

ical institutions or in conflict with the Constitution and laws of the United States or of this state, except as modified, changed or repealed by our own statutes, has been adopted, and is in force in this state. Perry v. Fletcher, 93 Or. 43, 182 Pac. 143."

In Eastern Oregon Land Co. v. Willow River Land & Irrig. Co., 201 Fed. 203, 213, this court said:

"It will not be necessary to enter into a discussion of the statutes and various decisions of the Supreme Court of Oregon defining riparian rights in that state. We will accept the opinion of the learned District Judge in this case upon that question that:

'The riparian proprietor is entitled to the ordinary and usual flow of a stream as long as it is of any beneficial use to him and this may, under some circumstances, include flood or overflow waters reasonably to be anticipated during ordinary seasons.'"

The decision referred to is that of Judge Bean of the District Court of the United States for the District of Oregon, 187 Fed. 466, and is as follows:

"The general doctrine of riparian rights is too firmly established in this state to be shaken now by judicial decision. It is useless to cite authorities. The riparian proprietor is entitled to the ordinary and usual flow of a stream as long as it is of any beneficial use to him. * * *".

In Harris v. Southeast Portland Lumber Co., 123 Ore. 549-556, 557, 262 Pac. 243, it is said:

> "In Weiss v. Oregon Iron & Steel Co., 13 Ore. 496, 11 Pac. 255, this court, speaking through Mr. Justice Lord, said:
>
> 'Riparian proprietors are entitled, in the absence of grant, license, or prescription limiting their rights, to have the stream which washes their lands flow as it is wont by nature, without material diminution or alteration. * * * The general principle is, that every owner of land through which a natural stream of water flows has a usufruct in the stream as it passes along, and has an equal right with those above and below him to the natural flow of the water in its accustomed channel, without unreasonable detention or substantial diminution in quantity or quality, and none can make any use of it prejudicial to the other owners, unless he has acquired a right to do so by license, grant, or prescription.' "

After making the foregoing quotation from the 13th Oregon, the opinion in the Harris case, continues:

> "The rights claimed in this suit are purely riparian in their nature and, as such, each proprietor, in the absence of grant, license or prescription limiting his rights, may insist that the stream shall flow to his land in the usual quan-

> tity, at its natural place and height, and that it shall flow off his land to his neighbor below in its accustomed place and at its usual level, and this right is a right of property inseparably annexed to the soil itself and exists jure naturae as parcel of the land, which right will not be suspended or destroyed by mere nonuser, although it may be extinguished by the long continued adverse enjoyment of others: Gould on Waters (3d ed., §204). The evidence of a right by prescription 'ought always to be clear and conclusive'. MacRae v. Small, 48 Ore. 139, 85 Pac. 503."

This was fully recognized by a majority of the court in the Hood River case, the majority adopting the statement of Judge McCourt in his dissent, as follows:

> "Comparatively early in the judicial history of the state, this court by its decisions enforced and applied the common law doctrine of riparian rights, as defined and established by the American and English cases and by eminent text writers. Or. Iron Co. v. Trullenger, 3 Or. 1 (1867); Taylor v. Welch, 6 Or. 198 (1876); Hayden v. Long, 8 Or. 244 (1880); Coffman v. Robbins, Colohan, 12 Or. 239, 6 Pac. 503 (1885); Weiss v. Or. Iron Co., 13 Or. 496, 11 Pac. 255 (1886)."

The majority also held that the Water Code of 1909 did not unreasonably interfere with the vested ri-

parian rights of a riparian owner to develop power by recognizing the rights of appropriators above to divert some of the water to the prejudice of the fullest exercise of the right of the lower riparian owner as recognized by the common law of England, upon the theory that a state either by judicial decision or legislation may reasonably construe or apply the doctrine of common law riparian rights. I am willing to concede that the right of riparian owners to the use of the entire flow of a stream for power purposes in Oregon was subordinate to the right of upper riparian owners to use water for irrigation and am inclined also to agree with the holding of the Supreme Court of Oregon in the Hood River case that it was also subordinate to the right of the state to permit appropriation of water above the riparian land for beneficial use in irrigation. The question involved in the case at bar, however, does not involve a conflict between a riparian owner claiming power rights and upper riparian owner or appropriator claiming the right to use water for irrigation. It is a conflict between the owners of the adjoining banks of a stream to power developed by the stream in its flow along the stream bed which belongs jointly to the parties to the action. The appellee bases its right to use the water for power purposes, not upon its riparian right which obviously is no greater than that of the owner of the adjoining bank of the stream, but upon a permit issued by the state engineer giving it a right to use the water

of the stream for power purposes. It is claimed that this permit gives it a right superior to the riparian owner and this would be equally true whether the appellee were a riparian or merely an appropriator recognized by the state officials. I do not believe the legislature of the state has the power to divest the right of the appellant to the use of the water flowing across his land for power purposes and to grant that right to the owner of the opposite bank or to a third person. I will now state my reasons for this conclusion:

Where patents to government land were issued and rights thereby vested in a riparian owner to the usufruct of the water, the question of whether or not the act of the state or of private individuals acting under its authority is a taking of private property within the meaning of the 14th amendment, is necessarily one to be determined by the courts and ultimately of course by the Supreme Court of the United States. The federal courts must exercise their own independent judgment in the matter, as stated by the Supreme Court in Chicot County v. Sherwood, 148 U. S. 529, as follows:

> "In Hyde v. Stone, 61 U. S. (20 How.) 170, 175, it is said: 'But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the

distribution of their judicial power. In many cases state laws form a rule of decision for the courts of the United States and the forms of proceeding in these courts have been assimilated to those of the states, either by legislative enactment or by their own rules. But the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. Suydam v. Broadnax, 39 U. S. (14 Pet.) 67; Union Bank of Tennessee v. Vaiden, 59 U. S. (18 How.) 503.' This principle has been steadily adhered to by this court."

That serious interference with riparian rights is a taking of property in violation of the 14th amendment to the Constitution is recognized and decided by the Supreme Court of Oregon in Logan v. Spalding Logging Co., 100 Ore. 731, 736, 190 Pac. 349, where it is stated:

"It will be observed that the doctrine thus announced clearly asserts that interference with the natural flow of the stream, insofar as it injures the riparian proprietor, or interferes with his enjoyment of his right to the use of the stream, is a taking pro tanto of his property, which is governed by the constitutional provision above quoted. This statement of the law has been affirmed by this court in Trullinger v.

> Howe, 33 Ore. 219, 97 Pac. 548, 99 Pac. 880, 22 L. R. A. N. S., 545, and Flynn v. Vaughn, 55 Or. 372, 106 Pac. 642, and must be taken as the settled law in this state, regardless of what may have been the holding in some other jurisdiction."

I will return to a consideration of that question after calling attention to the fact that in the case at bar we are presented with a most unusual situation where the controversy is not between upper appropriators, or riparian owners, and a lower riparian owner, as in the Hood River case, but between adjoining riparian owners as to the right to use the hydraulic power due to the fall of water as it passes over their land. No one doubted in the Hood River case that a riparian owner, owning all the riparian lands along the stream was entitled to hydraulic power thereon due to the fall of the stream while on its property. This was assumed in the decision and is well established by the common law. The common law rule is stated by the Supreme Court in U. S. v. Rio Grande Dam & I. Co., 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1141:

> "The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent (3 Kent, Sec. 439): 'Every proprietor of lands on

the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (currere solebat) without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. Aqua currit et debet currere ut currere solebat is the language of the law. Though he may use the water while it runs over his land as an incident to the land he cannot unreasonably detain it, or give it another direction and he must return it to its ordinary channel when it leaves his estate'."

In Swain v. Pemigewasset Power Co., 85 Atl. 288, 291, the Supreme Court of New Hampshire said:

"The rights of riparian owners at common law to a beneficial use of the water of the river or stream passing through or adjacent to their lands are not open to serious doubt. They are entitled to a reasonable usufruct of the water, or of the power it is capable of developing in consequence of the natural configuration of the bed of the stream opposite their respective lands."

See Kinney on Irrigation and Water Rights, Vol. I, p. 843, §492, as follows:

"The riparian owner also has the right to the use of the water of a stream flowing by his land for the development of power, either by direct power developed from the flow of the water itself, or by the generation of electric energy for the transmission of electricity to other places than at the point where the same is developed upon the stream. The use of any riparian proprietors of the water for this purpose must be reasonable as compared to the like or other uses by other riparian proprietors upon the same stream. If the water is diverted from the stream for the purpose of getting a fall and thus developing power, after its use it must be returned to the stream for the use of the other riparian proprietors below. Any other disposition of the water after use would be termed an unreasonable use of the water."

In the case at bar if one party should acquire the right of the other to the land opposite no one would doubt that the owner of the banks and stream bed would be entitled to develop and use the hydraulic power thereon, so long as the water was returned to the stream undiminished. The appellant contends that the adjoining property holders, owning the land to the thread of the stream which constitutes their boundary are tenants in common to the stream and its bed. Appellant relies upon an early statute of the United States upon that subject, as follows:

"§2476. Navigable rivers within public lands to be public highways.

> All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both. Act May 18, 1796, c. 29, §9, 1 Stat. 468; Act March 3, 1803, c. 27, §17, 2 Stat. 235." (43 U. S. C. A. §931.)

The Supreme Court of the United States in Scott v. Lattig, 227 U. S. 229, said:

> "Thus, Rev. Stat. Sec. 2476, U. S. Comp. Stat. 1901, p. 1567, which is but a continuation of early statutes on the subject (Acts May 18, 1796, 1 Stat. at L. 464, c. 29, §9, U. S. C. S., 1901, p. 1567; March 3, 1803, 2 Stat. L. 229, c. 27, §17), declares: 'All navigable rivers within the territory occupied by the public lands shall remain and be deemed public highways and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both;' and of this provision it was said in St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 272, 288, 19 L. Ed. 74, 78, 'the court does not hesitate to decide that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on

the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways'."

It is not necessary to decide the exact relation of the parties in and to the power, that is, whether it has all the common law attributes of a tenancy in common or otherwise, for it is sufficient to say that each owns a part of the hydraulic power developed along their common boundary and that both together own it all. If then these two adjoining owners are entitled to the entire flow of the stream as it actually reaches their land for the purpose of generating power thereon, can the state legislature take the right of one owner to a part of this power and confer it upon the other in the exercise of the police power of the state? The proposition thus stated carries its own answer, for it has always been held that a state cannot in the alleged exercise of its police power take the property of one person and confer it upon another. As stated by the Supreme Court of North Carolina in Lowe v. Harris, 112 N. C. 472, 17 S. E. 539, 22 L. R. A. 379:

"No law which divests property out of one person and vests it in another for his own private purposes without the consent of the owner, has ever been held a constitutional exercise of legislative power in any state of the union", citing Cooley Const. Lim. 165; Wilkinson v. Leland, 27 U. S. (2 Pet.) 658, 7 L. Ed. 553;

Satterlee v. Matthewson, 27 U. S. (2 Pet.) 380, 7 L. Ed. 458; Hoke v. Henderson, 15 N. C. 4, 25 Am. Dec. 677; Wales v. Stetson, 2 Mass. 143, 3 Am. Dec. 39; Calder v. Bull, 3 U. S. (3 Dall.) 394, 1 L. Ed. 651; Dash v. Van Kleeck, 7 Johns. 507, 5 Am. Dec. 291; U. S. Const. art. 1, sec. 10; N. C. Const. art. 1, sec. 17; Butler v. Pennsylvania, 51 U. S. (10 How.) 416, 13 L. Ed. 478; Fletcher v. Peck, 10 U. S. (6 Cranch) 137, 3 L. Ed. 178; Stanmire v. Taylor, 48 N. C. 207, 214; King v. Hunter, 65 N. C. 603, 6 Am. Rep. 754; Wesson v. Johnson, 66 N. C. 189; 1 Kent. Com. 455; Stanmire v. Powell, 35 N. C. 312.

In the case at bar the basic right in controversy is the right of the appellees to divert more than 220 second feet of water for power under permits issued by the State Engineer. The right to 220 second feet is not disputed and the right of the appellees to a flow of 75 second feet to be taken from the stream and returned thereto above the land of the appellant is not disputed, but is not involved because it does not affect the amount of power to be developed in the stream along the boundary of the parties. To repeat, the appellees seek to divert 1397 second feet by the canal and head works under construction. Of this 1102 second feet are covered by permits; 220 second feet by a conceded and adjudicated right and 75 second feet under an adjudicated right not available to the ap-

pellees at the proposed point of diversion. That is, the controverted right of the appellees is based upon its action in appropriating this 1082 second feet of water for power purposes. The flow of the stream varies from 60,000 second feet in time of high water to about 600 second feet in time of low water. At low water the appellant would have only about 150 second feet on its land. This amount being assured to it by the provision of the decree requiring a level of 1070 feet at the point of diversion. The appellant's land has no value except that which arises from the riparian right for power purposes. It was purchased by appellant for that purpose. That right is worth $30,000. If the appellees can maintain their right to divert 1347 second feet at all times it will greatly diminish, if it does not absolutely destroy, the value of appellant's land. Can this taking be justified under the police power of the state?

This court has gone very far in recognizing the power of a city to destroy the value of real estate in the exercise of police power. Marblehead Ld. Co. v. City of Los Angeles, 47 F. (2d) 528. But no court, so far as I am advised, has gone to the extent of holding that a state can grant a right to one individual which belongs to another because the first individual first applied for the right. The grant itself assumes title to be in the state and not in the individual. It is only upon this theory that a grant to the first applicant could be justified. Can it be said

that a law which permits an officer of the state to grant rights in private property to the first applicant therefor is a valid exercise of police power? Certainly not, so long as the Constitution forbids the taking of private property without compensation. The Supreme Court of Oregon has not gone this far and its decisions both before and after the Water Code of 1909 recognize that under the Constitution of the United States the state could not divest the property of one person and confer it on another. That court having held in Hough v. Porter, 51 Ore. 318, 95 P. 732, 98 P. 1083, 102 P. 728, that the Desert Land Act of 1877 severed from riparian land all rights to water thereon, and having recognized that right in the public it follows logically that the state could dispose of such waters on behalf of the public so far as riparian owners are concerned. On this theory the appellant, whose predecessor acquired the land by patent from the government after the Desert Land Act was passed, has no riparian right to the power and cannot complain that the owner of the adjoining riparian land has been granted rights inconsistent with its claim to power rights. But we hold that this construction of the federal statute is erroneous and that the appellant's predecessor acquired by his patent a riparian right to water and power under the laws of the United States, which at the time of the grant recognized that the patent to riparian land conveyed such rights to the water as the state at that time recognized. In support of this well established rule I quote from

a decision of the Supreme Court in Brewer v. Elliott Oil & Gas Co. v. United States, 260 U. S. 77:

> "It is true that where the United States has not in any way provided otherwise, the ordinary incidents attaching to a title traced to a patent of the United States under the Public Land Laws may be determined according to local rules; but this is subject to the qualification that the local rules do not impair the efficacy of the grant, or the use and enjoyment of the property by the grantee. Thus, the right of the riparian owner under such grant may be limited by the law of the state either to high or low-water mark, or extended to the middle of the stream. Packer v. Bird, 137 U. S. 661, 669, 34 L. Ed. 819, 820, 11 Sup. Ct. Rep. 210.
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> "We said in Oklahoma v. Texas, decided May 1, 1922 (258 U. S. 574, 66 L. Ed. 771, 42 Sup. Ct. Rep. 406): 'Where the United States owns the bed of a non-navigable stream, and the upland on one or both sides, it, of course, is free, when disposing of the upland, to retain all or any part of the river bed; and whether, in any particular instance, it has done so, is essentially a question of what it intended. If, by a treaty or statute or the terms of its patent, it has shown that it intended to restrict the conveyance to the upland, or to that and a part only of the river bed, that intention will be controlling; and, if its intention be not otherwise shown, it will be taken to have assented that its

conveyance should be construed and given effect in this particular according to the law of the state in which the land lies. When it is disposing of tribal land of the Indians under its guardianship, the same rule applies.'

"In government patents containing no words showing purpose to define riparian rights, the intention to abide the state law is inferred. Mr. Justice Bradley, speaking for the court in Hardin v. Jordan, 140 U. S. 371, 384, 35 L. Ed. 428, 434, 11 Sup. Ct. Rep. 808, said: 'In our judgment, the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the lands lie.' "

Consequently, it was held by the Supreme Court in that case that an act of the state legislature changing the definition of a navigable stream could not retroactively affect the rights of a patentee of government land. I quote from that opinion the following which occurs immediately preceding the above quotation:

"It is not for a state, by courts or legislature, in dealing with the general subject of beds and streams, to adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law and grant, or would enlarge what actually passed to the

state, at the time of her admission, under the constitutional rule of equality here invoked."

If the legislature of a state cannot limit the rights of a riparian owner to a stream bed by a definition of navigability inconsistent with its definition at the time a patent was issued, it is equally clear that it cannot take away vested riparian rights by a new definition of such rights limiting the right to the use and appropriation then made. (Clark v. Cambridge & A. Irr., etc., Co., 45 Neb. 798, 64 N. W. 239; Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781, 56 A. L. R. 277 (note).

Assuming, however, that the state in the exercise of its police power may modify the rights of a riparian owner, how far have they been modified by the Water Code of Oregon? Ignoring for a moment the interpretation placed on this code by the Supreme Court of Oregon, it is to be observed that it expressly recognizes *all* vested rights in water. Section 1 provides, "Subject to existing rights, all waters within the state may be appropriated for beneficial use, as herein provided and not otherwise; but nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, or corporation or association to any water". This declaration is repeated in Sec. 70, subdivision 1, as follows:

"Sec. 70, Vested Rights Preserved.

"1. Nothing in this act contained shall impair the vested right of any person, association or corporation. * * *

"8. * * * This act shall not be held to bestow upon any person, association or corporation any riparian rights where no such rights existed prior to the time this act takes effect."

Sec. 70, sub. 2, provides that "actual application of water to beneficial use prior to the passage of this act by or under the authority of any riparian proprietor, or by or under authority of his or its predecessors in interest shall be deemed to create in such riparian proprietor a vested right to the extent of the actual application to beneficial use; provided such use has not been abandoned for a continuous period of two years."

Sub. 3 recognizes the right of a riparian owner to proceed with his construction of works for the application of water to beneficial use. Now the use of water by a riparian owner is the exercise of a right common to all riparian owners, and is not adverse to them. It is not measured by the needs of the riparian owner, but by the capacity of the stream to supply water to all riparian owners along its banks. Oliver v. Robnett, 190 Cal. 51. The distinction is pointed out by the Supreme Court of Oregon in a late case. In re Waters of the Deschutes River, 134 Ore. 623, 704, from which I quote as follows:

"Where the old riparian right system prevails, a riparian owner using water in that capacity is, in effect, always a tenant in com-

> mon with other riparian owners on the same stream, and the amount to which such riparian owner is entitled varies with the reasonable demands of the other riparian proprietors. In other words, it is not a right to a definite amount of water while an appropriator is always a tenant in severalty and a decree can be rendered under the statute recognizing the right of an appropriator for a definite amount of water."

See also, in re Rights to Use of Waters of Silvies River, 115 Ore. 27, 31, points 32, 33. Hence, insofar as the Water Code recognized as a vested right the right to water appropriated to his own use, and beneficially used by a riparian owner, it did not limit (it expressly disavowed an intent to limit the right), but it extended the right of a riparian owner by recognizing his actual appropriation as creating a right in severalty which might exceed his riparian right, although it is of course true that the appropriation might be less than the riparian right. In the Hood River case, supra, the Supreme Court of Oregon not only held that the riparian right of the Pacific Power and Light Company was subordinate to the appropriations above, but also that the Power Company was not entitled to an adjudication that it had any riparian right because it had not exercised its right prior to the enactment of the Water Code of 1909. So construed, the Water Act by its own force destroyed all riparian rights which had not been beneficially used, solely because of such

nonuse, and this without giving any opportunity to exercise the right after the enactment of the law. So construed in its application to the rights of appellant it is a clear violation of the Fourteenth Amendment to the Constitution. I hold that the Water Code did not and could not wholly destroy the power rights of the appellant. The appellees are not relying upon their riparian power rights. Their action in securing a permit from the State Engineer and their development work in the stream bed is avowedly hostile to the appellant's claim. Their possession is adverse. Upon the completion of their diverting works and the installation of their power plant they will receive a certificate of ownership of the power thus developed, all in utter disregard of the appellant's rights in the stream, and this right of appellees is sustained by the decision of the court below. The decree of the court below is based upon a finding that the appellant failed to establish any water right. This finding of a lack of proof of a right is the equivalent of a finding of no water right, for appellant's case is predicated upon its riparian right which is thus put in proof. This finding and decree would be conclusive in any future litigation between the parties to establish their respective rights.

The exercise of control over water inconsistent with the rights of a riparian owner where the control thus exercised might ripen into an adverse title, has always been held to be sufficient ground for the intervention of a court of equity by way of injunc-

tive relief. As stated by the Supreme Court of Oregon, 13 Ore. 503:

> "Nor do we think the objection to the exercise of the jurisdiction well taken. Mr. High says: 'A riparian proprietor owning to the center of a stream is entitled to the aid of equity to prevent a diversion of the waters from their natural channel. Nor does the neglect of complainants to use or appropriate the water-power, or the fact that they have as yet sustained but small pecuniary damage, or that defendants would be subjected to heavy expense if compelled to restore the water to its original channel, present such objections as would warrant a court of equity in refusing the relief.' (High on Injunction, §795, and authorities cited)."

To deny that relief without reservation would destroy appellant's right and vest a part of it in appellees. On the other hand, if each of the two riparian owners can prevent the other from developing power, neither can do so, and the right is rendered worthless to either or both. It follows that a full recognition of the common law riparian right to full and continuous flow would destroy the right. Here is a legitimate field for the exercise of the police power of the state to give to the owner desiring to utilize his power the right to make the necessary changes on his land to do so. On the other hand, the rights of the appellant should be fully protected. This can be accomplished, I think,

by granting an injunction unless the appellees shall file a disclaimer to more than one-half of the flow of the stream, after the deduction of the flow of 220 second feet to which it has an acknowledged priority, and an agreement to pay a reasonable sum for the use of all water above one-half of the said amount to be fixed by the court, and payable monthly for such power so used for the previous month, the appellees to have the right to use the full flow of 1347 second feet if the water level of 1070 feet permits until such time as the appellant is ready to utilize its one-half of the flow of the stream less 220 feet.

[Endorsed]: Opinion and Dissenting Opinion. Filed Nov. 5, 1934. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 6874.

THE CALIFORNIA OREGON POWER COMPANY, a Corporation duly organized and existing under and by virtue of the laws of the State of California,

Appellant,

vs.

BEAVER PORTLAND CEMENT COMPANY, a Corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and CITY OF GOLD HILL, OREGON, a Municipal Corporation, Existing under the laws of the State of Oregon.

Appellees.

DECREE

APPEAL from the District Court of the United States for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Oregon, and was duly submitted;

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed with costs in favor of the appellees and against the appellant,

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by this Court, that the appellees recover against the appellant for their costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered Nov. 5, 1934. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Mr. A. E. Reames, counsel for the appellant, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including January 2, 1935; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR
United States Circuit Judge.

Dated: San Francisco, California,
December 1, 1934.

[Endorsed]: Filed Dec. 1, 1934. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing four hundred and eighty (480) pages, numbered from and including 1 to and including 480, to be a full, true and correct copy of the entire record, excluding certain original exhibits, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 6th day of December A. D. 1934.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 4, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.